

## **Tab 5**

### **Procedures and Ethics**

- Operating Procedures
- Ethics Standards

# OPERATING PROCEDURES

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# OPERATING PROCEDURES OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

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## INTRODUCTION

These procedures provide guidance for the operation of the Advisory Council on Historic Preservation (“Council”). They supplement and clarify more general requirements appearing in the National Historic Preservation Act (“Act”), the Administrative Procedure Act, and the Council’s regulations. In addition, the Council follows administrative procedures of the Department of the Interior relating to finance, personnel, budget, and travel in lieu of developing its own procedures. The Council has 24 members (collectively referred to as the “Membership”), headed by a Chairman, and a staff which is overseen by an Executive Director.

## I. STATEMENT OF POLICY

The law entrusts the authorities of the Council to the Membership. To carry out these authorities in an efficient and prompt manner, the Membership recognizes that the Chairman and the Executive Director, under the supervision of the Chairman, must possess the authority to act on behalf of the Membership on a daily basis, conforming to general policies and specific directives established by the Membership. Frequent and open communication among the Executive Director, the Chairman, and the Membership is necessary for proper coordination with, and conformance to, these policies and directives.

The Membership sets general policy for programs and activities, initiates or approves programs and activities, and exercises long term oversight of the Council’s policies, programs and activities. Members participate in specific programs and activities individually, in groups, and as the full Membership.

The Chairman undertakes the pursuit and oversight of the implementation of such policies, programs and activities. The Chairman ensures that the Executive Director is carrying out approved policies and conforming to them. The Chairman makes policy decisions on behalf of the Membership as needed when the Membership is unavailable to act, consulting with the Membership as appropriate. In the absence or unavailability of the Chairman, the Vice Chairman performs the functions of the Chairman.

The Executive Director undertakes the daily implementation of programs and activities, subject to the policy guidance of the Chairman and the Membership. The Executive Director oversees the staff of the Council and ensures that their individual actions and objectives are consistent with the policies established by the Membership.

## II. COUNCIL ORGANIZATION

### A. Council Membership

The National Historic Preservation Act specifies that the Membership shall consist of 24 members. Six members (the Secretary of the Interior, the Secretary of Agriculture, the Architect of the Capitol, the Chairman of the National Trust for Historic Preservation, the President of the National Conference of State Historic Preservation Officers, and the General Chairman of the National Association of Tribal Historic Preservation Officers) serve *ex officio*. The President appoints the remaining 18 members (four general public members, four experts, a governor, a mayor, a member of an Indian tribe or a Native Hawaiian organization, and the heads of seven Federal agencies).

### B. Designees

Federal members, the Chairman of the National Trust, the President of the National Conference of State Historic Preservation Officers, the General Chairman of the National Association of Tribal Historic Preservation Officers, and the Governor may designate another officer of their department, agency, or organization to serve on the Council in their stead. In accordance with 54 U.S.C. § 304101(b), Federal agencies may only designate an Assistant Secretary or an officer having major department-wide or agency-wide responsibilities. Appendix A to these Operating Procedures, entitled “Membership Credentials,” sets forth guidance for naming designees. A designee must provide the Chairman with a letter of designation, setting forth the basis for the designation, prior to participating in activities of the ACHP as a designee. Members should update ACHP staff in a timely fashion regarding a change of incumbents in their designated positions by sending information about such changes to [designeeupdates@achp.gov](mailto:designeeupdates@achp.gov). Failure to do so can result in ACHP communications, including notifications and requests for action, not reaching the relevant designees.

### C. Membership Credentials

1. **Qualifications.** 54 U.S.C. § 304101 sets forth the criteria for members of the Council and their designees. Individual members or their designees should meet the qualifications set forth in Appendix A to these Operating Procedures, entitled “Membership Credentials.”

2. **Credentials review.** The Chairman will review the credentials of any designee named by an agency or organization pursuant to the Act. If the Chairman determines that a designation may be deficient, the Chairman shall consult with the member making the designation to resolve the issue. The Chairman may take such other actions as appropriate to ensure that the intent of the statute is carried out.

## D. Observers

1. **Member-designated observers.** Any member, including one not authorized by statute to designate an alternate representative, may, after submitting a written request (including electronic mail) to the Chairman and with the written approval of the Chairman, designate an observer who may actively participate in any or all activities of the Membership on behalf of the specified member in the absence of the Member or such member's designee pursuant to Section II.B. of these Operating Procedures, but may not make or second any motion and may not vote. These observers shall have a fixed term not to exceed four (4) years commencing from the date of the Chairman's written approval. A Member may reappoint Member-designated observers.

2. **Chairman-designated observers.** The Chairman may invite the head of a Federal, State, Tribal, or local public agency or non-profit organization to become an observer when the Chairman determines that the participation of such agency or organization will benefit the Council. The head of such an observer's entity may designate someone else within the entity to participate with the ACHP in his or her stead so long as that designee is an official with major entity-wide responsibilities. The status of Chairman-designated observers differs from the status of individuals invited by the Chairman to participate in a specific matter before the Council. These observers shall have a fixed term not to exceed two (2) years commencing from the date of the written invitation by the Chairman to the observer. The Chairman may reappoint Chairman-designated observers. The Chairman may appoint up to five (5) observers without the concurrence of a majority of the Membership, and may appoint more than five (5) observers with the concurrence of a majority of the Membership.

3. **Participation of observers.** Observers may attend all meetings and may speak when recognized by the Chairman or the subgroup chairman, as applicable, but may not make or second any motion and may not vote. Challenges to the credentials or participation of an observer shall be resolved in accordance with Section II.C.2 of these Operating Procedures.

4. **Termination.** The Chairman, or the Membership by majority vote of those present and voting, may terminate the observer status of a Chairman-designated observer at any time. The appointing Member, or the Chairman in consultation with the appointing Member, may terminate the status of Member-designated observer at any time.

## E. Council Subgroups

1. **Establishment.** The Chairman may establish standing and ad hoc subgroups to carry out the Council's business. The Chairman shall appoint to such subgroups a chairman and subgroup participants who may be chosen from the Membership or may be others, and shall notify the Membership in writing of such appointment or appointments.

2. **Non-Member Subgroup Participants.** A subgroup participant who is not selected from the Membership and is not an official designee shall be subject to the restrictions under Section II.D.3 of these Operating Procedures.

3. **Changes and Termination.** At his or her discretion, the Chairman may substitute any subgroup participant or chairman and may terminate the subgroup.

4. **Powers.** Unless given a specific delegation of authority by majority vote of the Membership, the powers of subgroups shall be limited to advising the Chairman and the Membership on the exercise of their legal authorities. When a subgroup carries out advisory functions, it is not expected to entertain motions or hold votes but, rather, have its chairman report to the Chair or Council, as appropriate, about the subgroup's discussions and advice.

5. **Alternate Participation in Subgroup.** Where a federal agency Member, the Architect of the Capitol, the Governor, the Mayor, the Chairman of the National Trust for Historic Preservation, the President of the National Conference of State Historic Preservation Officers, or the General Chairman of the National Association of Tribal Historic Preservation Officers has been appointed to a subgroup, such entity or individual may name one alternate participant to participate in subgroup functions, and this alternate participant may make motions, second motions, and vote, when the subgroup is carrying out those limited advisory functions. The appointed participant should notify the chairman of the subgroup and the Executive Director in writing when naming such an alternate participant.

6. **Rules of Order.** Subgroups established under this section shall generally adhere to these Operating Procedures and to Robert's Rules of Order.

### III. COUNCIL MEETINGS

This section of these Operating Procedures establishes general procedures that pertain to meetings of the Membership or of subgroups established under Section II.E of these Operating Procedures. Procedures governing meetings held in the course of the Section 106 process set forth in the Council's regulations are contained in Section V.

#### A. Types of meetings

The Membership may take formal actions at meetings of the Membership or subgroups may take formal actions in accordance with Section II.E. Meetings of the Membership or of subgroups may be held in regular session, in special session, or unassembled.

1. **Regular session.** Normally, the Membership shall conduct its business at meetings held in regular session with full adherence to these Operating Procedures. The Chairman shall schedule the regular meetings of the Membership, which will generally be held three to four times per year.

2. **Special session.** When the Chairman determines that circumstances warrant a departure from normal procedures, such as to discuss a time-sensitive proposed program alternative or to discuss legal matters outside the public view, the Chairman may call a meeting in special session.

3. **Unassembled meeting.** When the Chairman determines that the Membership or a subgroup should act on a single or limited number of issues and a regular or special meeting is not warranted, the Chairman may convene an unassembled meeting. In an unassembled meeting, business will be conducted by mail, telephone, electronic mail, facsimile, or other such methods of communications. Reasonable notice of unassembled meetings shall be given by the Executive Director. No business shall be transacted at unassembled meetings that will violate the principles of public participation adopted by the Membership.

## **B. Public participation and disclosure**

The public may attend, either in-person or virtually as circumstances allow or require, regular and special session meetings of the Membership. However, the Council will not provide public attendance for the following: 1) unassembled meetings and 2) meetings or portions of meetings dealing with subjects properly withheld from public disclosure in accordance with 5 U.S.C. §552(b). The public shall have access to materials transmitted to and from members in the conduct of an unassembled meeting, with the exception of materials properly withheld from public disclosure in accordance with 5 U.S.C. §552(b). When the Chairman determines that business before the Council requires exclusion of the public, the Chairman shall limit the closing of the meeting to the time necessary to transact the confidential business.

## **C. Meeting place**

The Council shall hold in-person regular and special session meetings of the Membership in places generally accessible to the public and to people with disabilities. However, normal Federal office building security requirements that restrict access to individuals who have made their desire to attend known beforehand shall not be considered to make a meeting place unacceptable. The Council shall broadcast virtual and hybrid regular and special session meetings of the Membership via online simulcast, webinar, or virtual meeting format.

## **D. Notice**

The Executive Director shall notify the Membership of regular and special session meetings of the Membership at least 7 days before the meeting date. If 7 days notice of special session meetings is not possible under the circumstances, the Executive Director shall make a good faith effort to provide notice to the Membership and to the public as early as possible. The Executive Director may provide other means of notice as the Executive Director determines to be necessary. In providing such additional notice, the Executive Director shall make a good faith effort to provide actual notice to local governments, Indian tribes, the public and other interested

persons where such notice is not precluded by excessive cost or burdens on staff time. Notice of meetings of subgroups shall be given as determined appropriate by the Executive Director.

### **E. Quorum**

Thirteen voting members shall constitute a quorum necessary for the transaction of business at a meeting of the Membership. Subgroups will only need a quorum when carrying out non-advisory authorities formally delegated by the Membership. Such a quorum shall be a simple majority of the voting members in the subgroup, namely, Members or their official designees under Sections II.A. and II.B. of these Operating Procedures.

### **F. Call to Order**

Meetings of the Membership may be called to order by the Chairman or, in the Chairman's absence, by the Vice-Chairman. Should both be absent, a non-Federal member previously designated by the Chairman shall call the meeting to order.

Meetings of subgroups may be called to order by their respective chairmen or any subgroup participant previously designated by the subgroup's chairman.

### **G. Order of business**

Regular meetings of the Membership shall generally adhere to the following order:

1. Adoption of the agenda.
2. Consideration of the minutes.
3. Reports of subgroups.
4. Staff reports.
5. Special or priority business.
6. Unfinished business.
7. New business.

The Chairman may make adjustments in the order of business to facilitate the purpose of such meeting and to meet other special scheduling needs.

The Chairman shall establish the order of business for special session meetings and unassembled meetings in a manner that facilitates the purpose of such meetings.

### **H. Agenda**

Regular meetings of the Membership shall be conducted in accordance with an agenda adopted by the Membership at the beginning of each meeting. A provisional agenda shall be sent to the Membership prior to the regular meeting.

## **I. Recorder**

The Chairman shall appoint a recorder who shall be responsible for keeping the minutes of any regular or special session meeting. The chairman of any subgroup shall appoint a person responsible for providing a summary of any subgroup meeting.

## **J. Minutes**

The recorder of any regular or special session meeting shall keep full and accurate minutes of the meeting. Except as directed by the Chairman, transcripts shall not be required. The recorder shall prepare minutes promptly after a meeting and the Membership shall review and approve such minutes at the subsequent meeting.

## **K. Motions and Resolutions**

Motions and resolutions made and considered in any meeting of the Membership or subgroup shall generally conform to Robert's Rules of Order. The recorder of such meeting shall accurately record all motions and resolutions in the minutes along with a record of the action taken on each at the meeting.

## **L. Procedural questions**

The Chairman or subgroup chairman shall resolve questions of meeting procedure in accordance with Robert's Rules of Order. In the event of conflict between Robert's Rules and these procedures, the specific terms of these procedures shall take precedence.

## **M. Voting**

Only members or duly authorized designees may vote at meetings of the Membership or subgroups. In regular or special session meetings, voting may be voice or show of hands, as determined by the Chairman or subgroup chairman, unless a roll call vote is required. Voting in unassembled meetings may be by mail, telephone, electronic mail, facsimile, or other such methods of communications, as determined by the Chairman or subgroup chairman. In any event, all votes cast in an unassembled meeting shall be recorded as a roll call vote.

Roll call votes shall be required whenever the Membership or a subgroup takes a final action on any recommendation, advice, or comment; on the adoption of any rule, procedure, or policy; or any question pertaining to budget or administration; or any other matter which the Chairman or subgroup chairman determines requires a record of how each member voted. Unless a voting member objects, the Chairman or subgroup chairman may waive the roll call requirement.

Matters voted on by the Membership or subgroups shall require a simple majority of those present and voting. Exceptions are: comments rendered under Section 106 (including program comments pursuant to 36 C.F.R. § 800.14(e)), exemptions granted under 54 U.S.C. § 304108(c), evaluations of Federal agency activities under 54 U.S.C. § 304102, specific delegations of

authority to subgroups authorizing subgroups to act on behalf of the Membership, and recommendations to the President or the Congress. These exceptions require the vote of a majority of the Membership. However, the adoption of positions on legislation, regardless of whether such positions are intended to be communicated to the President or Congress, only require a simple majority of those present and voting.

No member shall be permitted to vote on a matter in which the member or the member's agency or organization has a direct interest not common to other members, such as comments rendered under Section 106 that will be addressed to the member's agency or an action that may present a personal conflict of interest. Members abstaining from voting shall so indicate during a roll call vote or at the close of a vote by voice or by show of hands.

## **N. Proxies**

A member or his/her duly authorized designee may give a proxy to another voting member to be cast on any number of specific issues on a meeting agenda. Voting by proxy is permitted at meetings of the Membership and subgroups unless expressly prohibited by the Chairman when the subgroup is established. No member may hold more than two proxies. Valid proxies shall be counted as members present and qualified to vote whenever a point of order is raised about the presence of a quorum.

## **O. Business Meeting Participation**

Participation at the table in ACHP business meetings shall be limited to Members (or, in the absence of a Member, the designee for such a Member under Section II.B. of these Operating Procedures), and Chairman-designated observers duly named in accordance with the Act and these Operating Procedures. With the prior approval of the Chairman, a member-designated observer may, in the absence of the relevant Member or such member's designee under Section II.B. of these Operating Procedures, participate at the table, subject the restrictions set forth at Section II.D.1. of these Operating Procedures.

# **IV. COUNCIL ADMINISTRATION**

## **A. Financial Administration**

1. **Budget Formulation.** The Chairman shall establish the budget request level for the Council each fiscal year. The budget request shall reflect the established programs and priorities of the Council. The Executive Director, under the supervision of the Chairman, shall prepare the budget request and supporting documentation. When the budget request is formally submitted to the Office of Management and Budget (OMB) and the Congress in accordance with statute, it shall be made available to individual members on request. All members shall conform to applicable OMB directives regarding the confidentiality of budget information and materials. The Chairman or the Executive Director shall regularly report to the Membership on the progress of the budget review and appropriations process.

**2. Detailed Budget.** The Executive Director shall prepare the annual detailed budget in accordance with established Council programs and priorities, applicable OMB directives, and Congressional funding. The Executive Director shall submit the detailed budget to the Chairman for review to ensure conformance with Council policies. The Executive Director shall develop any necessary reprogramming of funds or personnel levels in consultation with the Chairman.

**3. Donations.** In accordance with 54 U.S.C. § 304105(g) (donations authority), the Executive Director shall accept and administer donations received by the Council. The Executive Director shall consult with the Chairman regarding the collection and disbursement of donations and shall report on the status of donations at each regular session meeting.

In accordance with the donations authority, the Council may use any donations in ways consistent with the Council's duties and the purposes of the Act. Such use includes, but is not limited to, funding internships in the Council, research on historic preservation issues, events encouraging public involvement in or education about historic preservation, and Council visits to historic sites.

In order to avoid any questioning of Council operations, and consistent with the federal ethics recommendations about otherwise permissible gifts at 5 C.F.R. § 2635.201(b), the Executive Director will consider declining donations that the Executive Director believes might lead a reasonable person with knowledge of the relevant factors to question his or her integrity. Factors in making this determination include whether:

- (i) The gift has a high market value;
- (ii) The timing of the gift creates the appearance that the donor is seeking to influence an official action;
- (iii) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and
- (iv) Acceptance of the gift would provide the donor with significantly disproportionate access.

Accordingly, the Executive Director may consider declining donations from entities that the Executive Director knows are consulting parties in Section 106 reviews where the Council is formally involved, or from entities having or seeking contracts with the Council.

## **B. Personnel Management**

1. **Applicable Regulations and Procedures.** Except in those areas where the Membership or staff has adopted its own specific regulations or procedures for the conduct of personnel management matters, the Council shall follow applicable provisions of the Department of the Interior.

2. **Interim Regulations and Procedures.** If a particular situation arises in which the Chairman determines that following the Department of the Interior provision is inconsistent with the policies of the Council, the Chairman, in consultation with the Membership or the Executive Director, may establish an interim procedure to supersede the Department of the Interior provision. The Chairman shall provide notice of such interim procedure to all potentially affected parties. The Chairman shall propose, within 180 days after the development of an interim procedure, for action by the Membership, an amendment to the Operating Procedures or to applicable Council regulations that would make such final.

### **3. Appointment and Compensation**

*a. Council members.* The Chairman, in consultation with the Membership or an appropriate subgroup, shall establish necessary policies governing the payment of compensation and reimbursement of travel and subsistence expenses in accordance with 54 U.S.C. § 304104.

*b. Council staff.* The Executive Director shall appoint and fix the compensation of staff in accordance with the provisions of 54 U.S.C. § 304105(b) through (d).

*c. Senior Executive Service.* The selection and management of Council employees in the Senior Executive Service shall conform to the appropriate regulations and procedures established by the Department of the Interior, provided that the provisions of 54 U.S.C. § 304105(a) and (c) regarding employees in the competitive service above the highest rate for the grade GS-15 shall also govern the appointment and fixing of compensation of employees in the Senior Executive Service. The Chairman shall appoint individuals to serve on the necessary appraisal and resource boards. At least one member of each such board shall be chosen from the Membership.

4. **Performance Appraisal Plans for Non-SES Employees.** In accordance with applicable regulations of the Department of the Interior, the Executive Director shall establish and administer the necessary performance appraisal plans for staff that are non-SES.

5. **Grievance Procedures.** The Council shall follow the applicable regulations and procedures of the Department of the Interior regarding grievance proceedings.

### **C. Information Management**

1. **Notification of Council Activities.** The Executive Director shall regularly provide the Membership with written or verbal reports, generally on a monthly or bi-monthly basis, which shall include information on staff activities, budget matters, pending litigation and legislation, recently concluded Section 106 cases, and other matters of general interest. Additional materials will be included as appropriate.

2. **Distribution of other Council materials to members.** The Executive Director shall ensure that all members are provided with copies of Council documents and publications.

3. **Distribution of Council materials to the public.**

*a. Policy of availability.* It is the policy of the Membership to make Council materials available to the public and other interested parties. Accordingly, under normal circumstances, the Executive Director shall provide documents reflecting final action on the website of the Council. When the Executive Director determines that a formal Freedom of Information Act request is necessary, the requester of Council materials shall be so informed. The Executive Director shall respond to Freedom of Information Act requests in accordance with 5 U.S.C. § 552 and the Council's Freedom of Information Act regulations.

*b. Withholding documents from disclosure.* The Council may withhold information and documents from public disclosure only in accordance with 5 U.S.C. § 552 and the Council's Freedom of Information Act regulations at 36 C.F.R. Part 810.

## **V. SECTION 106 ADMINISTRATION**

This section of these Operating Procedures applies to the conduct of business under the Section 106 process set forth in the Council's regulations at 36 C.F.R. Part 800.

### **A. Delegation of Authority**

The regulations implementing Section 106 of the Act provide for the Council to participate in the Section 106 process in various ways. The delegation of responsibilities to the Chairman and the Executive Director is set forth in the document entitled "Delegation of Authority" incorporated into these Operating Procedures as Appendix B.

## B. Meeting Procedures

1. **Public Meetings.** In the course of Section 106 review of any particular case, the Membership, a subgroup, or the Executive Director, in consultation with the Chairman, may conduct a public meeting for the purpose of gathering and disseminating information on the undertaking under consideration. Such meetings shall be open to the public and be held near the site of the undertaking at a place accessible to the public. The Executive Director shall provide appropriate notice of such meetings at least 15 days in advance of the meeting. Notice shall be designed to reach the Membership and relevant representatives of national, State, or local governments, public applicants for Federal assistance, permits or licenses, Indian tribes, Native Hawaiian organizations and other interested persons.

2. **Council Comment.** When the Membership is called upon to provide comments on an undertaking when no Memorandum of Agreement is submitted or when the parties to the Section 106 consultation fail to reach agreement, the Chairman shall schedule the matter for hearing at a regular session meeting, establish a subgroup to hear the matter at a meeting of such subgroup, or provide comments without convening a meeting.

*a. Meetings of the Membership.* Meetings of the Membership to consider an undertaking shall be conducted in accordance with Section III of these Operating Procedures.

*b. Meetings of Subgroups.* Meetings of subgroups designated to consider and provide comments on a particular undertaking shall conform to the procedures set forth in the document entitled "Panel Meeting Procedures," incorporated into these Operating Procedures as Appendix C.

*c. Comment Without a Meeting.* The Chairman may determine that comments on a particular undertaking shall be given without convening a meeting to consider the undertaking. In such cases, the Chairman may provide comments in one of two ways:

(i) The Chairman may conduct the review of the undertaking in an unassembled meeting in accordance with Section III.A.3 of these Operating Procedures. The Chairman shall forward to the Membership the documentation submitted by the agency under Sections 800.7(c)(1) and 800.11(g) of the regulations, a report on the case from the Executive Director, and other pertinent information. The Chairman shall specify the date by which members must return their comments. The Chairman shall prepare a final comment document, taking into account the views of the Membership, and transmit that comment to the agency official; or

(ii) The Chairman may develop comments on the undertaking and then circulate these comments to the Membership for consideration. The Chairman shall consider any comments received from the Membership in preparing the final comment document, which the Chairman shall then transmit to the agency official and to the Membership.

## **VI. MEMBER INVOLVEMENT IN SECTION 106 CASES**

### **A. Cases Pending at the Staff Level**

It is the policy of the Council to encourage member participation wherever appropriate and in accordance with the applicable federal rules of ethics, with the understanding that the Membership will need to maintain impartiality should there be a termination of the Section 106 process, leading to a formal Council comment. Participation of a Member shall not supersede the specific authorities for Section 106 case management delegated to the Chairman or the Executive Director under these Operating Procedures.

### **B. Cases Pending Before the Chairman**

When a Section 106 case is being reviewed by the Chairman for the determination on the method of rendering comment in the event of a termination of consultation or a request for comments without submission of a Memorandum of Agreement, the Chairman shall notify the Membership of the case at the beginning of the Chairman's review period.

## **VII. LEGISLATIVE MATTERS**

### **A. Formulation of Policy and Positions**

Policy and positions on federal, state, and local legislative proposals shall be established by action of the Membership. In those situations where the need for timely action precludes formal approval by the Membership, the Chairman and the Executive Director may establish and convey as appropriate an interim position by consulting with the Membership or an appropriate subgroup. The Chairman or the Executive Director shall notify the Membership when such action is to be taken, invite the views of members on the issue, and report to the Membership on any legislative positions taken or testimony delivered in a timely manner. The Membership shall be provided an opportunity to ratify or revise that interim position at the next meeting of the Membership. In the event a Member questions the consistency of a proposed interim legislative position with Administration policy, the Chairman will convene an unassembled meeting and take a vote of the full Membership on the proposed position or defer consideration of the position to the next meeting of the Membership.

## **B. Authority to Testify**

The Chairman, or another member or staff designated by the Chairman, is authorized to testify on federal, state, or local legislative matters on behalf of the Membership. Where time permits, testimony should be developed in consultation with the Membership or an appropriate subgroup. The Chairman may provide other testimony as may be consistent with policy and positions on legislative proposals established by the Council in accordance with Section VII.A. of these Operating Procedures. Absent extraordinary circumstances, the Council and its Chairman may provide testimony and advice on state or local draft legislation only if requested to do so by a legislator, senior executive branch staff, state historic preservation office, tribal historic preservation office, representative of a municipality or local agency, or representative of a nonprofit organization.

## **C. Conduct of Legislative Liaison Activities**

The Executive Director is responsible for the monitoring of legislative matters affecting the Council, overseeing liaison with members and committees of Congress, and representing the Membership in legislative activities conducted at the professional staff level in the Congress and within the Administration. The Executive Director shall discharge these duties in consultation with the Chairman and the Membership or an appropriate subgroup.

## **VIII. AMENDMENTS**

These procedures may be amended, revised, or repealed by vote of a two-thirds majority of the Membership (16).

*Adopted August 1987*

*Amended July 2001, May 2012, July 2015, March 2017, and July 12, 2023.*

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## APPENDIX A: MEMBERSHIP CREDENTIALS

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### INTRODUCTION

The National Historic Preservation Act Amendments of 1980 reconstituted the Membership of the Council with the objective of providing “a more balanced forum where representatives of various interests can deliberate on policy questions and reach true ‘public interest’ decisions on historic preservation matters” (House Report, p. 40). The legislation, as further amended in 1992, 2006, and 2016, goes on to name the representation to the Council leaving some discretion to the President in the appointment of agency heads, expert members, general public members, a governor, a mayor, and a member of an Indian tribe or Native Hawaiian organization. The amendments also permit certain institutional members of the Council to designate representatives to the Council. In the President’s exercise of the appointments authority and in the selection of designees for institutional members, care must be taken to ensure that the intent of the statute is fulfilled. The purpose of this document is to provide the decision makers with guidance from the Council on these matters. Furthermore, this document establishes a process of review for credentials questions and decisions.

### STATEMENT OF POLICY

The National Historic Preservation Act, as amended, clearly indicates the intent of Congress to establish a Council comprised of individuals who possess the authority and expertise that is inherent in the top-level policymaking positions of Government and the private sector. It is the objective of the Council, through this document on credentials, to carry out this Congressional intent. Each member who participates in the activities of the Council should possess the level of authority or expertise that the Congress envisioned for the respective Membership category which that member represents. The objective of this policy is to ensure that members of the Council are peers, occupying comparable positions within their organizations or fields.

**1. Federal members.** The statute specifies that the Secretary of the Interior, the Secretary of Agriculture, and the heads of seven other agencies whose activities affect historic preservation appointed by the President shall sit on the Council. The Architect of the Capitol also is named as an *ex officio* member. The statute further allows each agency head to designate another officer of the agency to sit in his/her stead. A limitation on this authority for executive branch members was added in the 1980 amendments: no such officer other than an Assistant Secretary or an officer having major department-wide or agency-wide responsibilities may be so designated. (54 U.S.C. § 304101(b)).

A designee need not be an Assistant Secretary *per se*. In agencies where the title of Assistant Secretary does not exist, the level at which the approximate equivalent of assistant secretarial powers are exercised is appropriate. In all cases, the alternative designation may be used when

the officer to be designated has responsibilities that are agency-wide in that they extend to the full scope of activities of the member agency and not just one subdivision, office, division, or bureau within the member agency. For example, an officer that has been appointed the Senior Policy Official of the member department or agency (not a bureau or other component of the member's department or agency) under Section 3(e) of Executive Order 13287 meets the statutory standard for a designee by the inherent definition of the officer's duties under the Executive Order. Factors for the agency head to consider for other officials include the scope of their responsibilities, the level at which they sit in the department or agency, the official to whom they report, and the nature of their duties and authorities as they relate to the department or agency's historic preservation responsibilities.

The Architect of the Capitol is not subject to the specific limitations that 54 U.S.C. § 304101(b) places on designees. However, the principles articulated in this document for Executive Branch agencies should guide any designations made by the Architect.

**2. Non-Federal *ex officio* members.** The statute names the President of the National Conference of State Historic Preservation Officers, the General Chairman of the National Association of Tribal Historic Preservation Officers, and the Chairman of the National Trust for Historic Preservation as *ex officio* Council members. The authority of 54 U.S.C. § 304101(b) to name designees is extended to these three members, but the restrictions applied to Federal members do not pertain. The policies inherent in the provisions relating to Federal designees should guide designations in these cases. Designees should be in a policymaking position within the organization and have major, organization-wide responsibilities. Recognizing the corporate nature of these organizations, designations should generally be restricted to officers of the board or corporation and the chief executive officer.

**3. Expert members.** The statute directs the President to appoint four experts in the field of historic preservation to be selected from the disciplines of architecture, history, archeology, and other appropriate disciplines. These are specified in the legislative history to include, but not be limited to, urban planning, engineering, recreation, landscape architecture, anthropology, economics, human geography, or law, when the practice of the discipline "directly or primarily" involves historic preservation (House Report, p. 41).

Professional criteria for historians, architects, and archeologists have been established by the Secretary of the Interior to set standards for professional representation on State Review Boards (36 C.F.R. 61.5). These standards may serve as guidance for threshold qualifications for expert Council members. However, noting the level of other Council members as well as the Council's role in setting Government-wide and national policies, an added dimension of national recognition or accomplishment within a member's discipline might well be considered when these appointments to the Council are made. This could be evidenced by a demonstrated record of professional achievement, through research, publication, practice, or academic activity, that reflects a recognized national stature within the discipline.

The statute does not permit an expert member to designate an alternate representative.

**4. Governor and Mayor.** The statute requires the President to appoint a governor and a mayor to the Council. The purpose is “to better represent the concerns of State and local government in the Council’s deliberations” (House Report, p. 44). The statute permits the governor to have a designee. While the Act does not provide restrictions for the appointment of a governor designee other than needing to be “another officer of his department, agency, or organization,” it would be appropriate for such a designee to meet standards comparable to those set forth for federal Member Designees. The Council believes the elected nature of these officials precludes recommending further criteria for this class of member. The statute does not permit a mayor to designate an alternate representative.

**5. General public members.** The statute requires the President to appoint three at-large members from the general public. In addition, the Chairman is appointed from the general public. This class of member is intended “to provide a voice for the citizens whose daily lives are affected by historic preservation activities.” They may be appointed as representatives of a group “such as civic associations or labor unions or as individual citizens” (House Report, p. 41). Because of the broad range of suitable representatives of the public, the Council believes that any specific criteria on individual members’ credentials would be inappropriate. However, due consideration should be given to the contribution a general public member can make to the Council’s activities, either in a representational or individual capacity. The statute does not permit a general public member to designate an alternate representative.

**6. Indian Tribe or Native Hawaiian organization member.** The statute requires the President to appoint “one member of an Indian tribe or Native Hawaiian organization who represents the interests of the Indian tribe or Native Hawaiian organization of which he or she is a member.” (54 U.S.C. § 304101(a)(12)). Due to the broad range of suitable representatives of Indian tribes or Native Hawaiian organizations, the Council believes that any specific criteria on individual members’ credentials would be inappropriate. The statute does not permit the Indian tribe or Native Hawaiian organization member to designate an alternate representative.

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## **APPENDIX B: DELEGATION OF COUNCIL FUNCTIONS UNDER 36 C.F.R. PART 800**

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### **BACKGROUND**

The regulations implementing Section 106 of the Act are codified at 36 C.F.R. part 800.

These regulations give the Membership the responsibility to carry out its purposes.

However, the Membership delegates some of its responsibilities under the regulations to the Chairman and to the Executive Director, as set forth in this Appendix.

In some cases, the Council intends to delegate a responsibility to both the Chairman and the Executive Director. When that is the case, this document will either describe those circumstances in which each party shall take responsibility or authorize the Chairman to redelegate responsibility to the Executive Director for a particular matter or situation.

This delegation will go into effect immediately upon adoption by the Membership.

### **POLICY**

This document allocates the Council's responsibilities under the regulations between the policymaking parts of the agency, represented by the Chairman and the members, and the professional staff of the agency, represented by the Executive Director. Generally, the Council, in the form of the Chairman and the members, retains final decision-making authority in those areas where there are conflicts between historic preservation values and Federal project needs requiring a resolution that reflects the public interest. Delegation to the professional staff is made for the areas of routine administration and resolution of cases that do not present significant controversy or questions of policy.

Nothing in this delegation of authority shall prohibit the Executive Director from seeking advice or guidance from the Chairman or prohibit the Chairman from seeking advice or guidance from the members when carrying out the responsibilities duly delegated to them.

## DEFINITIONS

**Chairman.** The term “Chairman” refers to the Chairman of the Council appointed by the President, or another individual member of the Council designated by the Chairman to act on behalf of the Chairman in a particular matter or for a particular time.

**Executive Director.** The term “Executive Director” means the Executive Director of the Council, or an individual Council employee designated by the Executive Director to act in the Executive Director’s behalf on a particular matter or for a particular time.

**Members.** The term “Members” refers to the members of the Council and their official designees.

**NHPA.** The term “NHPA” means the National Historic Preservation Act as amended. (54 U.S.C. §§ 300101 et seq.)

Unless otherwise noted, the term “Section” refers to sections within 36 C.F.R. part 800.

## SECTION BY SECTION DELEGATIONS

**Section 800.2(b)(1).** The general responsibilities of the Council, mentioned by Section 800.2(b), in deciding whether to enter the Section 106 process, as well as the documentation and notification requirements under this decision, is delegated as detailed below on the specific portions of the regulations concerning such determinations and decisions.

**Section 800.2(c)(2)(ii)(E).** The Council hereby delegates to the Executive Director its responsibility under Section 800.2(c)(2)(ii)(E) to receive copies of agreements whereby an Agency Official grants Indian tribes or Native Hawaiian organizations additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in subpart B of the revised regulations.

**Section 800.3(c)(4).** The Council hereby delegates to the Executive Director its responsibility under Section 800.3(c)(4) to consult with the Agency Official when the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination and the Agency Official decides to consult with the Council, in lieu of the SHPO/THPO, instead of proceeding to the next step in the process based on the finding or determination.

**Section 800.3(d).** The Council hereby delegates to the Executive Director its responsibility under Section 800.3(d), regarding consultation on tribal land, to complete the Section 106 process with the Agency Official and Indian tribe when the SHPO has withdrawn from the process and as appropriate.

**Section 800.4(c)(2).** The Council hereby delegates to the Executive Director its responsibility under the third sentence of Section 800.4(c)(2) to request the Agency Official to obtain a determination of eligibility pursuant to 36 C.F.R. Part 63.

The Council hereby delegates to the Executive Director its responsibility under the last sentence of Section 800.4(c)(2) to receive and, where appropriate, to grant a petition asking that the Council request the Agency Official to obtain a determination of eligibility of a property off tribal lands, where the petition is received from an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the property and that does not agree with an Agency Official's determination of its eligibility.

**Section 800.4(d)(1).** The Council hereby delegates to the Executive Director its responsibility under Section 800.4(d)(1) to object within 30 days of receipt of an adequately documented finding of "no historic properties affected."

**Section 800.5(c)(2)(i).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.5(c)(2)(i) to receive, and respond to, a request from an Agency Official to review a finding of no adverse effect pursuant to Section 800.5(c)(3) (see below), where the SHPO/THPO or any consulting party disagree with the Agency Official's finding within the 30-day review period.

**Section 800.5(c)(2)(ii).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.5(c)(2)(ii) to: (1) receive, from an Indian tribe or Native Hawaiian organization that has made known to an Agency Official that it attaches religious and cultural significance to a historic property subject to the finding of no adverse effect and that disagrees with such finding by the Agency Official, a request to review such finding pursuant to Section 800.5(c)(3) (see below), and (2) respond to such a request.

**Section 800.5(c)(2)(iii).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.5(c)(2)(iii) to decide and request, guided by Appendix A, the Agency Official to submit to it the no adverse effect finding along with the required documentation, for the Council's review pursuant to Section 800.5(c)(3) (see below).

**Section 800.5(c)(3).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.5(c)(3) to review findings of adverse effects and to notify the Agency Official as to the determination on whether the adverse effect criteria have been correctly applied.

**Section 800.6(a)(1).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.6(a)(1) to receive notifications of adverse effect findings.

The Council hereby delegates to the Executive Director its responsibilities under Section 800.6(a)(1) to: (1) receive any invitations or requests, from an Agency Official, the SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party, to participate in the consultation for the resolution of adverse effects, (2) notify in writing to the Agency Official and all consulting parties as to whether the Council will participate in such consultation and, if it does decide to participate, that its decision to participate meets the criteria under Appendix A, (3) advise the head of the agency of its decision to enter the process, and (4) actually participate in such consultation.

**Section 800.6(a)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.6(a)(2) to invite other individuals or organizations to become consulting parties when the Council is participating in the consultation to resolve adverse effects.

**Section 800.6(b)(1)(iv).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.6(b)(1)(iv) to receive copies of executed Memoranda of Agreement, along with the required documentation.

**Section 800.6(b)(1)(v).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.6(b)(1)(v) to: (1) receive a request to join consultation where the Agency Official and SHPO/THPO fail to agree on terms of a Memorandum of Agreement, (2) decide whether to accept such a request, and (3) notify the agency when such a request is declined.

**Section 800.6(b)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.6(b)(2) to participate in consultation regarding ways to avoid, minimize or mitigate adverse effects and its responsibilities under Section 800.6(b)(2) to execute Memoranda of Agreement. The Executive Director is hereby authorized to redelegate this responsibility to execute a Memorandum of Agreement to the Chairman where the Executive Director so recommends due to the specific nature of the case.

**Section 800.6(c)(1).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.6(c)(1) to execute, amend, or terminate a Memorandum of Agreement to which the Council is a signatory. The Executive Director is hereby authorized to redelegate this responsibility to execute, amend or terminate a Memorandum of Agreement to the Chairman when the Executive Director so recommends due to the specific nature of the case.

**Section 800.6(c)(7).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.6(c)(7) to receive amended Memoranda of Agreement to which the Council is not a signatory.

**Section 800.7(a).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.7(a) to determine that further consultation will not be productive and terminate consultation, and to notify other consulting parties, providing them the reasons for terminating in writing.

**Section 800.7(a)(1).** The Council hereby delegates to the Chairman its responsibilities under Section 800.7(a)(1) to receive a request for Council comment, pursuant to Section 800.7(c), from the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities, when the Agency Official terminates consultation.

**Section 800.7(a)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.7(a)(2) to execute a Memorandum of Agreement with the Agency Official when the SHPO terminates consultation. The Executive Director is hereby authorized to

redelegate this responsibility to execute such a Memorandum of Agreement to the Chairman where the Executive Director so recommends due to the specific nature of the case.

**Section 800.7(a)(4).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.7(a)(4) to notify the Agency Official, the agency's Federal Preservation Officer and all consulting parties of a termination, when the Council has terminated consultation (see Section 800.7(a) above), and to consult with the agency's Federal Preservation Officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

**Section 800.7(b).** The Council hereby delegates to the Chairman its responsibilities under Section 800.7(b) to determine whether it is appropriate for the Council to provide additional advisory comments upon an undertaking for which a Memorandum of Agreement will be executed.

**Section 800.7(c)(1).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.7(c)(1) to request the Agency Official to provide additional information on an undertaking and provide assistance to the Council in arranging an onsite inspection and an opportunity for public participation (this subsection relates to occasions where the Council is to provide comment without a memorandum of agreement).

**Section 800.7(c)(2).** The Council hereby delegates to the Chairman its responsibilities under Section 800.7(c)(2) to transmit the Council's comments in accordance with Section 800.7(c)(3).

**Section 800.7(c)(4)(i).** The Council hereby delegates to the Chairman its responsibilities under Section 800.7(c)(4)(i) to receive the summary of a decision from an agency head that has taken Council comments into account.

**Section 800.8(c).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.8(c) to receive advance notification from an Agency Official that it intends to use the NEPA process and documentation to comply with Section 106 in lieu of the procedures under Sections 800.3 through 800.6.

**Section 800.8(c)(1)(iii).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.8(c)(1)(iii) to engage in consultation regarding effects, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents.

**Section 800.8(c)(2)(i).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.8(c)(2)(i) to receive the DEIS or EIS, when such documents are being prepared, from the Agency Official.

**Section 800.8(c)(2)(ii).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.8(c)(2)(ii) to object to the Agency Official that preparation of the EA, DEIS or EIS has not met the standards set forth in Section 800.8(c)(1) or that the

substantive resolution of the effects on historic properties proposed in an EA, DEIS or EIS is inadequate.

The Council hereby delegates to the Executive Director its responsibilities under Section 800.8(c)(2)(ii) to receive, and resolve, objection referrals from the Agency Official.

**Section 800.8(c)(3).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.8(c)(3) to review objections, and to notify the Agency Official as to whether it agrees or disagrees with the objection.

**Section 800.8(c)(5).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.8(c)(5) to receive notification from the Agency Official that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in Sections 800.3 through 800.6 will be followed as necessary.

**Section 800.9(a).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.9(a) to receive, and respond to, requests for the Council's advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the Agency Official's compliance with the Council's regulations, provided that the Executive Director may refer specific matters to the Chairman and Council for action.

**Section 800.9(c)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.9(c)(2) to receive notification and documentation from an Agency Official that it (the Agency Official) has determined that 54 U.S.C. § 306113 is applicable and that circumstances may justify granting the assistance at issue.

**Section 800.9(c)(2)(i).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.9(c)(2)(i) to formulate its opinion, and provide it to the Agency Official, as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects (see Section 800.9(c)(2) above).

**Section 800.9(c)(2)(ii).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.9(c)(2)(ii) to receive notification from the Agency Official as to its consideration of the Council's opinion on whether to grant assistance to the applicant (see Section 800.9(c)(2) above).

**Section 800.9(d).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.9(d) to evaluate the operation of the Section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the NHPA.

**Section 800.9(d)(1).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.9(d)(1) to request, and receive, from Agency Officials documentation of agency policies, operating procedures and actions taken to comply with Section 106, and to request and receive from other participants in the Section 106 process available information and documentation.

**Section 800.9(d)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.9(d)(2) to make recommendations to participants, the heads of Federal agencies, and the Secretary of the Interior on actions to improve the efficiency and effectiveness of the Section 106 process, provided that the Executive Director may refer specific matters to the Chairman and Council for action.

**Section 800.10(b).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.10(b) to receive requests from Agency Officials to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under Section 800.6.

**Section 800.10(c).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.10(c) to request a report from the Secretary of the Interior under 54 U.S.C. § 304110 to assist in a consultation involving a National Historic Landmark.

**Section 800.10(d).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.10(d) to report the outcome of the Section 106 process (regarding National Historic Landmarks under Section 800.10) to the Secretary of the Interior and the head of the agency responsible for the undertaking.

**Section 800.11(a).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.11(a) to: (1) determine whether applicable documentation standards are not met, (2) notify the Agency Official as to such determination and specify the information needed to meet the standard, (3) receive requests to review, and actually review, disputes regarding whether documentation standards are met, and (4) provide its views to the Agency Official and the consulting parties as to such disputes.

**Section 800.11(c)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.11(c)(2) to: (1) consult with the Secretary of the Interior in reaching determinations on the withholding and release of information due to confidentiality issues under 54 U.S.C. § 307103, (2) receive from the relevant Federal agency, available information related to the confidentiality concern, and (3) advise the Secretary of the Interior and the relevant Federal agency as to the confidentiality issue.

**Section 800.12(a).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.12(a) to engage in consultation regarding the development of emergency procedures.

**Section 800.12(b)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.12(b)(2) to receive notification from an Agency Official whose agency has not developed emergency procedures, that it proposes an emergency undertaking as an essential and immediate response to a disaster or emergency.

The Council hereby delegates to the Executive Director its responsibilities under Section 800.12(b)(2) to comment on such emergency undertakings within the timeframe available.

**Section 800.12(c).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.12(c) to object to a proposed emergency action by a local government (acting as Agency Official) regarding an imminent threat to public health or safety declared by the local government.

**Section 800.12(d).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.12(d) to receive, decide, and respond to, a request for an extension of the 30-day period within which emergency undertakings must be implemented in order for the emergency procedures under Section 800.12 to apply.

**Section 800.13(b)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.13(b)(2) to receive a report from the Agency Official on its actions to mitigate effects on subsequently discovered historic properties or unanticipated effects.

**Section 800.13(b)(3).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.13(b)(3) to receive, and respond to, notifications from the Agency Official as to actions taken to resolve adverse effects after subsequent discoveries, and to receive reports of the actions when they are completed.

**Section 800.14(a)(1).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(a)(1) to consult with the Agency Official and others during the development of alternate procedures.

Nevertheless, the Council retains for the members its responsibility under Section 800.14(a)(2) to review proposed alternate procedures, determine whether they are consistent with the Council's regulations and, if so, notify the Agency Official of this determination.

**Section 800.14(a)(4).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(a)(4) to provide Federal agencies notice and opportunity to comment on proposed alternate procedures under 54 U.S.C. § 302705.

**Section 800.14(b).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(b) to negotiate a Programmatic Agreement with an Agency Official.

**Section 800.14(b)(2)(iii).** The Council hereby delegates to the Chairman its responsibilities under Section 800.14(b)(2)(iii) to execute and terminate program Programmatic Agreements. The Chairman has the discretion to further delegate, in writing, these responsibilities to the Executive Director.

**Section 800.14(b)(2)(v).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(b)(2)(v) to determine whether the terms of a Programmatic Agreement are not being carried out.

**Section 800.14(b)(4).** The Council hereby delegates to the Chairman its responsibilities under Section 800.14(b)(4) to designate an agreement document as a prototype programmatic agreement.

**Section 800.14(c)(5).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(c)(5) to receive requests for exempted categories.

Nevertheless, the Council retains for the members its responsibilities under Section 800.14(c)(5) to review such requests and decide whether to approve or reject the proposed exemption based on the consistency of the exemption with the purposes of the NHPA, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with 54 U.S.C. § 304108(c).

**Section 800.14(c)(6).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(c)(6) to determine that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of the Council's regulations.

The Council retains for its members its responsibilities under Section 800.14(c)(7) to terminate an exemption and to notify the Agency Official 30 days before the termination becomes effective.

**Section 800.14(d).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(d) to: (1) establish standard treatments, (2) publish notice of standard treatments in the Federal Register, (3) arrange for public participation in the development of standard treatments, (4) request an Agency Official to arrange for public involvement when the Agency Official has proposed the standard treatment, (5) notify and consider the views of SHPO/THPOs on the proposed standard treatment, (6) follow the consultation requirements under Section 800.14(f) with regard to proposed standard treatments that may affect historic properties on tribal lands or those of religious and cultural significance to tribes, and (7) terminate standard treatments by publication of a notice in the Federal Register 30 days before the termination takes effect.

**Section 800.14(e).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(e) to receive requests for program comments.

Nevertheless, the Council retains for the members its responsibilities under Section 800.14(e)(3) through (5) to: (1) notify and consider the views of SHPO/THPOs on the proposed program comments, (2) follow the consultation requirements under Section 800.14(f) as required, (3) request additional information, (4) seek the consent of the Agency Official to extend the period for providing comment, (5) provide, or decline to provide, program comments, (6) notify the Agency Official when it decides to decline to comment, and (7) determine to withdraw a program comment.

**Section 800.14(f)(2).** The Council hereby delegates to the Executive Director its responsibilities under Section 800.14(f)(2) to receive from Agency Officials summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations as part of the documentation for the proposed program alternative.

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## APPENDIX C: PANEL MEETING PROCEDURES

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### INTRODUCTION

The Council membership is called upon to issue formal comments in the rare instances where an adverse effect to a historic property is not resolved pursuant to the Section 106 regulations. The Council's Operating Procedures, at Section V.B.2.b., provide for subgroups of Council members ('panels') to meet with the purpose of considering and providing such formal comments. This Appendix sets forth the procedures for conducting such panel meetings.

### A. ORGANIZATION

1. **Chairman.** The Chairman of the Council shall designate the panel chairman from the non-Federal membership of Council. The panel chairman may designate a member of the panel to sit in his/her stead during temporary absence from a panel meeting or other panel functions. Should the designated panel chairman be unable to complete his/her assignment as panel chairman, the Chairman of the Council shall designate a successor from those non-Federal members already serving on the panel.

2. **Panel Membership.** The Chairman of the Council shall designate panel members. A panel shall consist of three non-Federal members and two Federal members, neither of whom shall represent the Federal agency involved in the undertaking at issue. The Chairman of the Council may designate substitute members at any time. Consistent with the federal rules of ethics, panel members will not include those with a conflict of interest or an impartiality issue regarding the undertaking at issue.

### B. CONDUCT OF PUBLIC PANEL MEETINGS

1. **Notice.** Generally, the Executive Director shall provide 10 days notice of all public meetings involving Council review of undertakings by publication in media reasonably determined to reach interested members of the public. In exceptional cases, no less than 7 days notice shall be given by such publication. The Executive Director will make reasonable efforts to directly provide such notification to known consulting parties through electronic mail.

2. **Agenda.** The public panel meeting shall be conducted in accordance with a provisional agenda that is adopted by the panel. Copies of the agenda shall be made available to the public prior to the meeting.

3. **Order of Business.** Unless the panel chairman determines otherwise, the agenda shall provide for the taking of public testimony, a site visit, reports from the consulting parties and any others deemed necessary by the panel chairman, and a commenting session.

4. **Public Testimony and Reports.** Unless otherwise specified by the panel chairman, public testimony and reports shall conform to general guidelines established by the Council for presentations at meetings.

5. **Written Statements.** Written statements may be submitted to the panel. The panel chairman may extend the period for submission of written statements beyond the meeting, provided such extension is consistent with the comment period under 36 CFR Section 800.7(c)(2). The panel will fully consider written statements only if statements are received by the deadline established by the panel chairman.

6. **Required Reports.** Unless the panel chairman determines otherwise, reports to the panel shall conform to general guidelines established by the Council for presentations at meetings.

7. **Onsite Inspections.** The panel chairman may schedule an onsite inspection as part of the panel meeting or incidental to the meeting. The Agency Official, the State Historic Preservation Officer / Tribal Historic Preservation Officer, and the Executive Director, or their designated representatives, shall be invited to attend. Other parties may attend as the panel Chairman deems appropriate.

8. **Open Meetings.** The Council will provide reasonable facilities for attendance of interested members of the public to the public panel meeting.

9. **Minutes.** A recorder designated by the panel chairman will keep minutes of public panel meetings and make such minutes readily available to the public within a reasonable time after the public panel meeting. The Executive Director shall send any such minutes to all members of the Council as soon as they are available.

## C. PANEL COMMENTS

1. **Deliberations.** The Council will maintain records of the deliberations of the panel in formulating its comments and will make such available to the public upon request, subject to exceptions permissible only by the Freedom of Information Act.

2. **Voting.** All members of the panel must vote on the panel's final comments. Panel members may vote by proxy given to the panel chairman. All final votes on panel comments shall be on record. All actions relating to panel comments shall require a simple majority for passage.

3. **Form of Comments.** Once adopted, and within the timeframe established by 36 C.F.R. § 800.7, the Executive Director shall transmit written comments to the head of the

Federal agency requesting comment or having responsibility for the undertaking and to all members of the Council. The comments shall have three parts: an introduction; a finding of facts; and conclusion and recommendations.

**4. Distribution of Comments.** The Council shall not release written comments of the panel until they have been received by the relevant head of the Federal agency. Comments transmitted via electronic mail are considered to be received at the moment they are sent by the Council. As soon as reasonably possible after the comments are received by the relevant Federal agency, the Executive Director will make available the comments of the Council to the State Historic Preservation Officer / Tribal Historic Preservation Officer and other consulting parties, and posted on the website and/or social media of the Council. The Council recommends that comments of the Council should be included in the final environmental impact statement (FEIS) or Record of Decision (ROD) prepared pursuant to the National Environmental Policy Act, if such an FEIS or ROD was prepared.

**5. Report to Full Council.** The panel chairman, the Chairman, or the Executive Director shall report the actions taken by the panel to the Membership via electronic mail. The Council may issue a final report to the President and Congress under authority of 54 U.S.C. § 304102(b) describing the actions taken by the agency in response to the Council's comments including recommendations for changes in Federal policy and programs, as appropriate.

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## APPENDIX D: POLICY GUIDANCE REGARDING ACHP ADVISING ON STATE AND LOCAL LEGISLATION

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### Policy Guidance Regarding Advisory Council on Historic Preservation Advising on State and Local Legislation

#### A. Background

The National Historic Preservation Act tasks the Advisory Council on Historic Preservation (ACHP) with several duties. Among them is that the ACHP must “advise” as to state and local legislation related to historic preservation. *See* 54 U.S.C. § 304102(a)(4). Both state and local governments have specified roles in the federal historic preservation framework, including through State Historic Preservation Offices and the Certified Local Government program, which tie these smaller political subdivisions more closely to the federal government than may be the case in other areas of federal influence. For the purposes of this policy, “local government” is deemed to include any political subdivision of a state, as articulated in that state’s general statutes or other relevant law.

#### B. General Policy

The ACHP may choose to exercise its authority under the National Historic Preservation Act to advise on state and local legislation, though it will not always choose to do so. This policy sets forth the criteria that will be used by the ACHP to determine whether to advise on state or local legislation.

#### C. Determinations Regarding Advising

##### 1. Reasons the ACHP May Not Advise

The ACHP has no obligation to advise on each and every state or local legislation, and it will not always elect to do so, even though one or more of the criteria may be met. This is due both to the sheer volume of preservation-related state and local legislation and concern that lack of localized knowledge and insight could result in inadvertently overlooking controversial situations or relying on faulty second-hand information. Moreover, it will most often be the case that those representing views consistent with the ACHP’s views on any particular state or local legislation will capably and effectively communicate those views whether or not the ACHP participates.

Despite these issues, and as further described in Section C.2. below, there are scenarios where the ACHP advice to state and local governments may be warranted and desirable.

## 2. Factors to Consider in Deciding Whether to Advise

The ACHP may choose to advise on state or local legislation when one or more of the following criteria is met:

- a. *The legislation has substantial positive or adverse effects on historic properties.* These impacts may include effects on: properties that possess a national level of significance or on properties that are of noteworthy importance or are a rare property type; large numbers of historic properties, such as impacts to historic properties throughout the state or local jurisdiction or to multiple properties within a historic district; or properties associated with marginalized or underserved communities. *The legislation could advance or hinder an established ACHP policy or guidance goal.* These goals may be stated in the ACHP strategic plan, guidance documents, legislative priorities, or policy statements and have included topics such as workforce development, heritage tourism, climate change, building a more inclusive preservation program, and supporting the participation of Indian Tribes in the national preservation program.
- b. *The legislation may set a precedent for the treatment of historic properties that may be adopted by other states.* Precedents may include proposals for innovative strategies that promote the preservation of historic properties, or, conversely, novel legislation inconsistent with the National Historic Preservation Act. Precedents may also include changes to established components of state or local preservation programs, such as designation, design review, demolition review, and economic hardship provisions, among others.
- c. *The legislation attempts to interpret or change legal frameworks related to the National Historic Preservation Act or its implementing regulations.* These frameworks may include the relationships between State or Tribal Historic Preservation Offices and the federal government, the duties of State or Tribal Historic Preservation Offices or Certified Local Governments, the process under Section 106 of the National Historic Preservation Act (Section 106), or state-delegated authority related to Section 106.
- d. *The legislation presents issues of concern to Indian Tribes or Native Hawaiian organizations, where such issues are related to federal preservation law or policy.* These issues of concern may include the identification or evaluation of, or assessment of effects on, historic properties to which an Indian Tribe or Native Hawaiian organization attaches religious and cultural significance; or the interpretation of Section 106 or preservation-related authorities, such as the Native American Graves Protection and Repatriation Act.

### **3. Issues Likely Deserving of Favorable ACHP Advising**

In establishing this guidance, the ACHP recognizes that some state or local legislation will not require review on a case-by-case basis by the entire ACHP membership because its subject matter is clearly consistent with long-established ACHP positions. With that in mind, the ACHP hereby authorizes the chair to advise favorably on draft state and local legislation that proposes to:

- a. Expand or create a rehabilitation tax credit program;
- b. Increase or provide funding to State or Tribal Historic Preservation Office(s), and/or programs affiliated with such office(s);
- c. Increase or provide funding to preserve or rehabilitate a building, structure, object, site, or district, listed or eligible for listing on a register of historic places;
- d. Increase or provide funding for a public or publicly supported conservation or preservation easement program; and/or
- e. Increase or provide funding for an existing education program focused on historic preservation or cultural heritage or authorize the creation of such a program.

### **4. Issues Likely Deserving of Unfavorable ACHP Advising**

In establishing this policy, the ACHP recognizes that some state or local legislation will not require review on a case-by-case basis by the entire ACHP membership because its subject matter is clearly inconsistent with long-established ACHP positions. With that in mind, the ACHP hereby authorizes the chair to advise negatively on draft state and local legislation that proposes to:

- a. Diminish or eliminate a rehabilitation tax credit program;
- b. Reduce or eliminate funding to State or Tribal Historic Preservation Office(s), and/or programs affiliated with such office(s);
- c. Reduce or eliminate funding to preserve or rehabilitate a building, structure, object, site, or district, listed or eligible for listing on a register of historic places;
- d. Reduce or eliminate funding for a public or publicly supported conservation or preservation easement program; and/or
- e. Reduce or eliminate funding for an existing education program focused on historic preservation or cultural heritage or authorize the creation of such a program.

## **D. Process Regarding Advising**

### **1. Reference to Operating Procedures**

The formulation of positions on state or local legislative matters and any testimony related thereto shall be formulated in accordance with Section VII of the Operating Procedures of the ACHP.

### **2. Third Party Requests**

Absent extraordinary circumstances, the ACHP will provide testimony and advice on state or local draft legislation only if requested to do so by any of the following individuals:

- a. A member of the ACHP or that member's designee;
- b. A Member of Congress;
- c. A state legislator;
- d. Senior state executive branch staff;
- e. State Historic Preservation Officer or appropriate deputy;
- f. Tribal Historic Preservation Officer or appropriate Tribal representative;
- g. Representative of a local government (such as a mayor or other local elected official) or a local agency (such as a historic commission chair); or
- h. Representative of a nonprofit organization with expertise in historic preservation and based in the geographic area in question.

### **3. Reporting to the ACHP**

The chair will report to the ACHP members on any actions taken pursuant to Sections C.3. or C.4. at the next ACHP business meeting.

*Adopted July 28, 2023*

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**APPENDIX E: POLICY GUIDANCE FOR ACHP  
COMMENTS TO CONGRESS ON SITE-SPECIFIC  
LEGISLATION**

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**Policy Guidance for ACHP Comments to Congress on Site-Specific Legislation**

***Background.*** When tracking pending legislation and providing advice to Congress on selected bills, the ACHP generally avoids addressing site-specific legislation. This is due both to the sheer volume of such bills and concern that lack of localized knowledge and insight could result in inadvertently overlooking controversial situations or relying on faulty second-hand information. Despite these problematic issues, however, there are scenarios where ACHP advice to Congress on site-specific legislation may be warranted.

***Factors to Consider in Decision Making.*** The ACHP may choose to offer comments on site-specific legislation when one or more of the following criteria is met:

- **The legislation addresses a highly significant historic property.** The exceptional significance of the property may already be recognized, for example, through its designation as a National Historic Landmark, as part of a National Park Service unit, or as a World Heritage Site. This criterion could also apply in cases involving a newly discovered or newly evaluated property that is of great significance.
- **The legislation is site-specific but also addresses a broader range of historic properties or advances an innovative preservation strategy.** Site-specific bills occasionally address the preservation or protection of multiple historic properties, often thematically related, making the impact of the legislation significantly broader than a single site. Likewise, the treatment of a specific historic property in a bill may provide an innovative model of a preservation approach that has broader applicability.
- **The legislation could advance an established ACHP policy goal.** Consistent with its strategic plan, the ACHP adopts various preservation policy goals, addressing issues such as heritage tourism, sustainability, building a more inclusive preservation program, and supporting the participation of Indian Tribes in the national preservation program. Site-specific bills often can promote such goals.
- **The legislation would set a damaging precedent for treatment of historic properties.** Occasionally legislation is introduced that could negatively impact the preservation of specific historic properties or establish legal principles that are inconsistent with the policies of the National Historic Preservation Act.

*Adopted November 26, 2018*

# ETHICS STANDARDS

# Do It Right

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*"Always do right. This will  
gratify some people and  
astonish the rest."*

Mark Twain  
(Samuel Longhorne Clemens)  
1835-1910

Advisory Council on Historic Preservation

NOTE

TO: Non-Federal Council Members

FROM: Javier Marques   
Assistant General Counsel / Alternate Ethics Officer

As Federal employees, Council members are subject to various ethics laws. However, those Council members not already employed by another Federal agency are considered to be "special Government employees" (SGEs) and, as such, are sometimes subject to less demanding standards of ethics.

This booklet introduces you to the rules of ethics generally applicable to Federal employees. At relevant points, I have inserted notes explaining how the standards for SGEs differ from the general standards described in this booklet.

Please contact John Fowler or me (202-606-8596) if you have any ethics-related questions.

Thank you for taking the time to read this booklet.

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# Message from the Director

One of the most important responsibilities of the Office of Government Ethics is to promote among Federal employees an understanding of ethical standards for public service. This handbook represents one part of the Office's effort to meet this responsibility. It illustrates a number of ethics-related problems commonly faced by Federal employees and is a good place to start familiarizing yourself with the rules of conduct to which you must adhere during your Federal service. The handbook is not exhaustive of the types of issues that may arise and is not intended to replace the applicable regulations and statutes. Its purpose is simply to convey a sense of the scope of the Federal ethics program.

Most Federal employees are honest, loyal, and hardworking men and women who are eager to meet the high standards the public expects of its public servants. Understandably, these men and women may ask why they need to read this handbook. The answer is that although many of the standards of conduct are highly intuitive, some are not. The rules in this handbook derive from detailed statutes, regulations, and executive orders. When ethical principles are reduced to rules, lines necessarily are drawn that might have been placed somewhat differently. Nonetheless, it is the responsibility of the Federal employee to observe the lines as drawn.

Although these rules of conduct are vitally important, we must recognize that adherence to them is merely a minimum requirement of Federal service. As the Council for Excellence in Government in its "Ethical Principles for Public Service" has noted, the hallmark of true Federal service is willingness to go beyond what is legally required to act affirmatively to honor the public's trust. The true Federal servant combines personal integrity with service in the public interest and, among other attributes, is eager to accept responsibility, has the courage of his or her convictions, and is willing to tell the boss what the boss does not want to hear. These are qualities that do not lend themselves to rule-making and they are, for the most part, beyond the purview of the Office of Government Ethics. But as we go about the business of educating Federal employees concerning the standards required of them, it is important not to lose sight of this distinction between not violating the public's trust and affirmatively acting to serve that trust. The success of our Government depends on the existence of a Federal workforce that meets both standards.

Stephen D. Potts  
Director

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# Contents

<b>Introduction</b>	7
<b>Gifts from Outside Sources</b>	10
The basic rule	10
What is a gift?	10
Exceptions to the gift rule	11
Limits on use of the exceptions	12
<b>Gifts between Employees</b>	14
The basic rule	14
What is a gift?	14
Exceptions to the gift rule	14
<b>Conflicting Financial Interests</b>	17
What is a disqualifying financial interest?	17
Imputed interests	17
Resolving the conflict	18
What is a prohibited financial interest?	19
<b>Impartiality in Performing Public Duties</b>	20
What are situations raising appearance concerns?	20
Resolving appearance concerns	21
Extraordinary severance payments	22
<b>Seeking Other Employment</b>	23
<b>Restrictions on Former Employees</b>	24
Permanent ban on certain activities	24
Two-year ban on certain activities	24
Additional restrictions imposed by statute	25
Additional restrictions imposed by executive order	25

<b>Misuse of Position</b>	27
Use of public office for private gain	27
Use of nonpublic information	27
Use of Government property	28
Use of official time	28
<b>Outside Activities</b>	29
Is it all right to engage in outside activities while working as a Government employee?	29
Activities that would require disqualification from matters critical to performance of the employee's official duties	29
Representing a person or organization before a department, agency or court; serving as an expert witness; and related activities	29
Receiving salary, contribution to, or supplementation of salary from a source other than the United States	30
Teaching, speaking, and writing	31
Fundraising activities	32
High-ranking noncareer employees and Presidential appointees	32
Just financial obligations	34
Agency pre-approval requirements	34
Additional restrictions	34
<b>Special Government Employees and Procurement Officials</b>	35
Special Government employees	35
Procurement officials	35



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# Introduction

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***"Government is a trust,  
and the officers of the  
government are trustees;  
and both the trust and  
the trustees are created  
for the benefit of the  
people."***

Henry Clay  
1777-1852

**Y**ou may have heard it said that "public service is a public trust." This means that each Federal employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. The public deserves and should expect no less.

The purpose of this handbook is to present an overview of the types of ethical issues that frequently arise and a summary of the laws and regulations relevant to those issues. The handbook is not intended to replace the applicable statutes, executive orders, and regulations. You will not find here answers to all the ethical questions you are likely to confront in connection with your work for the Government, but a careful reading of this handbook should help you recognize those questions as they arise.

Once you're aware of an ethical question, your response should be determined by the uniform Standards of Ethical Conduct for Employees of the Executive Branch. These regulations can be found in 5 C.F.R. part 2635. They set forth rules to be followed by executive branch employees in seven areas--

- gifts from outside sources;
- gifts between employees;
- conflicting financial interests;
- impartiality in performing official duties;
- seeking other employment;
- misuse of position; and
- outside activities.

The Standards of Ethical Conduct are based on Executive Order 12674, as amended by Executive Order 12731, and a number of ethics-related statutes. The executive order sets forth 14 principles of ethical conduct that Federal employees must follow and on which the Standards of Ethical Conduct build. The relevant statutes deal with matters such as conflicts of interest, gifts, and post-employment.

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The Council does not have supplemental ethics regulations.

In addition to the Standards of Ethical Conduct and the statutes, you will need to be aware of any supplemental regulations adopted by your agency that address concerns unique to your agency. Noncareer employees appointed to their positions on or after January 20, 1993, who are either "senior" appointees or involved in trade negotiations, will need, in addition, to become familiar with the post-employment restrictions in Executive Order 12834.

Some of the rules of conduct set forth in this handbook are very basic and obvious. Others are not. If you are confused or have doubts about the applicability of any of these rules, consult with your agency's ethics official. The official is there to answer your questions and help you understand what is required of you.

You should know that failure to follow the uniform Standards of Ethical Conduct or your agency's supplemental regulations could lead to reprimand, suspension, demotion, or even removal, depending on the circumstances. If the conduct also involves violation of one of the civil or criminal statutes, the penalty could include a monetary fine and/or imprisonment. Failure to adhere to the post-employment restrictions in Executive Order 12834 could lead to debarment from lobbying and/or civil proceedings for declaratory, injunctive, or monetary relief.

Don't put everything you've worked so hard to achieve at risk. Think before you act. Become familiar with the rules. And, if you have any concerns, talk to your agency ethics official.

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## Fourteen Principles of Ethical Conduct for Federal Employees

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*"Our differences are  
policies, our agreements  
principles."*

William McKinley  
1843-1901

- (1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
  - (2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.
  - (3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.
  - (4) An employee shall not, except as permitted by the Standards of Ethical Conduct, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.
  - (5) Employees shall put forth honest effort in the performance of their duties.
  - (6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.
  - (7) Employees shall not use public office for private gain.
  - (8) Employees shall act impartially and not give preferential treatment to any private organization or individual.
  - (9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.
  - (10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.
  - (11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.
  - (12) Employees shall satisfy in good faith their obligations as citizens, including all financial obligations, especially those -- such as Federal, State, or local taxes -- that are imposed by law.
  - (13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.
  - (14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in the Standards of Ethical Conduct. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.
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# Gifts from Outside Sources

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***"Only he can be trusted  
with gifts who can  
present a face of bronze  
to expectations."***

Henry David Thoreau  
1817-1862

## The basic rule

*Donna works at the Environmental Protection Agency assembling data on the incidence of pesticide poisoning nationwide. In the course of her work she has occasionally spoken to Paul, a representative of a particular pesticide manufacturer. They've discovered that they were both raised on farms in Kansas. One day Paul stops by Donna's office and proudly presents her with an expensive signed and framed print depicting a typical Kansas farm scene.*

May Donna accept the print? No.

A Federal employee may not accept gifts from any person or organization that --

- Seeks official action by the employee's agency;
- Does business or seeks to do business with the employee's agency;
- Conducts activities regulated by the employee's agency;
- Has interests that may be substantially affected by performance or nonperformance of the employee's official duties;
- Is an organization a majority of whose members are described above; or
- Gives the gift because of the employee's official position.

## What is a gift?

*Jake, an employee at the Fish and Wildlife Service, attends a 2:30 p.m. meeting with officials of a local environmental organization that is concerned about a proposed FWS regulation. The meeting is held at the offices of the environmental organization, which sends out for coffee and donuts. Jake would like to help himself to the refreshments but wonders whether they might be considered a prohibited "gift."*

May Jake accept the snacks? Yes.

The term "gift" includes almost anything of monetary value. But there are some items that won't be considered gifts. Among these are soft drinks, coffee, donuts, and other modest refreshments offered other than as part of a meal.

Other items that won't be considered gifts include--

- Items of little intrinsic value which are intended solely for presentation, such as greeting cards, plaques, certificates, and trophies;
- Anything paid for by the Government, secured by the Government under Government contract, or accepted by the Government in accordance with a statute;
- Anything for which the employee pays market value;
- Most rewards and prizes in contests open to the public;
- Commercial discounts available to the general public or to all Government or military personnel;
- Loans from banks and other financial institutions on terms generally available to the public; and
- Payments under pension and similar employee benefit plans.

An exception of particular importance to SGEs allows them to accept meals, lodgings, transportation and other benefits "resulting from [their] outside business or employment activities when it is clear that such benefits have not been offered or enhanced because of their official status [as Council members]."

The Office of Government Ethics provides the following example: The members of an Army Corps of Engineers environmental advisory committee that meets 6 times per year are SGEs. (continued on the next page)

### Exceptions to the gift rule

*Nick's job at the Federal Trade Commission is to provide economic input on issues involving consumer protection. He is given a ballpoint pen worth about \$18 from a member of a consulting firm that frequently makes presentations before the FTC on behalf of affected clients.*

May Nick accept the pen? Yes.

There are a number of exceptions to the rules against acceptance of gifts and one of these permits employees to accept unsolicited gifts with a market value of \$20 or less per occasion.

This "\$20 rule" does not apply to gifts of cash or investment interests. Also, under the rule, gifts received from any one source may not, in the aggregate, exceed \$50 in a calendar year.

...

*Jenny is employed as a researcher by the Veterans Administration. Her cousin and close friend, Zach, works for a pharmaceutical company that does business with the VA. Jenny's 40th birthday is approaching and Zach and his wife have invited Jenny and her husband out to dinner to celebrate the occasion.*

May Jenny accept? Yes.

(Continued from the previous page) A member who has a consulting business may accept an invitation to a \$50 dinner from her corporate client, an Army construction contractor, unless, for example, the invitation was extended in order to discuss the activities of the committee.

Gifts are permitted where the circumstances make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. It would be improper, however, for Jenny to accept the dinner if Zach charged the meal to his employer because then it would no longer be a gift from Zach.

Exceptions to the rule against acceptance of gifts allow employees to accept--

- Unsolicited gifts with a value of \$20 or less;
- Gifts clearly given because of a family relationship or personal friendship;
- Free attendance at an event on the day an employee is speaking or presenting information on behalf of the agency;
- Free attendance at certain widely-attended gatherings;
- Certain discounts and similar opportunities and benefits;
- Certain awards and honorary degrees; and
- Certain gifts based on outside business or employment relationships.

You should be aware that there are limitations on the applicability of some of these exceptions. For example, use of the widely-attended gathering exception would require an advance determination by your agency that your attendance is in the interest of the agency. Also, there are more exceptions than those listed above. When you are faced with a gift issue, it's a good idea either to get advice from your agency ethics official or to look up the relevant provisions in the regulations.

## Limits on use of the exceptions

Once you've determined that a gift falls within one of the exceptions to the gift rules, are you free to accept it? Not necessarily. None of the exceptions may be used to--

- Accept a gift in return for being influenced in the performance of an official act;
- Solicit or coerce the offering of a gift;
- Accept gifts so frequently as to create an appearance that you are using public office for private gain;
- Accept a gift of vendor promotional training in contravention of applicable procurement policies; or
- Accept a gift in violation of any statute.

Among the statutes you should know about are those prohibiting--

- Solicitation or receipt of bribes (18 U.S.C. § 201(b));
- Receipt of salary or any contribution to or supplementation of salary as compensation for Government service from a source other than the United States (18 U.S.C. § 209); and
- Solicitation or receipt of gifts from competing contractors by procurement officials (18 U.S.C. § 423(b)(2)).

Remember also that just because you may accept a gift under one of the exceptions to the gift rule doesn't mean that you must accept the gift. It is never wrong and is often wise to decline a gift offered by a person or organization whose interests could be affected by actions of the agency where you work or a gift offered because of your official position. Exercising your discretion to decline a gift may be particularly smart when a gift is offered by a person or organization whose interests could be affected by your official actions.

SGEs are exempt from this compensation limit.

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# Gifts between Employees

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***"Government is more than the sum of all the interests; it is the paramount interest, the public interest. It must be the efficient, effective agent of a responsible citizenry, not the shelter of the incompetent and the corrupt."***

Adlai Ewing Stevenson  
1900-1965

## The basic rule

*Joe is delighted with his new boss, Dan. In a few short months Dan has brought about creative changes in the division's work product while, at the same time, improving efficiency and boosting office morale. The two workers have also developed a friendship based on mutual respect and shared outside interests. Because of a conflicting family commitment, Joe and his daughter will be unable to use their season tickets for the next Orioles home game, so Joe thinks he'd like to give them to Dan.*

May he do so? No. And it would be impermissible for Dan to accept the tickets if offered.

An employee may not--

- Give or solicit for a gift to an official superior; or
- Accept a gift from a lower-paid employee, unless the two employees are personal friends who are not in a superior-subordinate relationship.

In this context, the words "superior" and "subordinate" refer to people in the employee's chain of command.

## What is a gift?

The term "gift" has the same meaning and excludes the same items set forth in the preceding section on Gifts from Outside Sources.

Remember that if you pay market value for what is given, then it won't be considered a "gift." Joe could give Dan the Orioles tickets if Dan paid Joe the face value of the tickets. Note also that carpooling arrangements between employees won't be considered gifts if you bear your fair share of the expense or effort involved.

## Exceptions to the gift rule

*For Christmas, Samantha, a secretary at the National Park Service, gives her supervisor a plant purchased for \$10.*

*Eli, a claims examiner at the Department of Veterans Affairs, takes his vacation at the beach. When he returns to work, he brings his supervisor a bag of saltwater taffy purchased on the boardwalk for \$8.*

---

*Susan, a section chief in the Department of Justice, invites an attorney on her staff to a dinner party at her home. The staff attorney brings her a \$15 bottle of wine.*

Are the plant, the taffy, and the wine permissible gifts? Yes. They fall within the exception for certain gifts given on an occasional basis. This exception would allow gifts given, for example, on Christmas, a birthday, or a return from vacation, provided that they consist of--

- Items other than cash which, considered together, are worth no more than \$10 for each occasion;
- Personal hospitality provided at a residence;
- Gifts to a host or hostess given in connection with the receipt of personal hospitality, even if the cost of these customary gifts is in excess of \$10;
- Food and refreshments shared in the office; or
- Leave sharing as permitted by Office of Personnel Management regulations.

• • •

A second exception permits the giving and accepting of appropriate gifts recognizing special, infrequent events provided that the events are--

- Occasions of personal significance such as marriage, illness, or the birth or adoption of a child; or
- Occasions that terminate a subordinate-official superior relationship such as retirement, resignation, or transfer.

*Jim works as the assistant to Carol, the personnel director of the Tennessee Valley Authority. Carol is in the hospital recovering from surgery and Jim would like to send her a \$30 floral arrangement.*

*Joan is a chemist employed by the Food and Drug Administration. The lab director who is her official superior, Glenn, is being promoted to a higher-grade position within the supervisory chain at the FDA. In honor of Glenn's promotion, Joan plans to send him a fancy fruit basket with a card stamped "FDA approved."*

---

Are the floral arrangement and the fruit basket permissible gifts?

The floral arrangement is fine. Although it is to be given to an official superior and to be accepted from a lower-paid employee, it falls within the exception for infrequent occasions of personal significance. The fruit basket, on the other hand, is not permissible. Unlike a retirement or resignation, Glenn's promotion does not terminate his official-subordinate relationship with Joan. Neither is it an infrequent occasion of personal significance.

. . .

A third exception to the gift rule permits voluntary contributions of nominal amounts and solicitation of voluntary contributions of nominal amounts for gifts to official superiors--

- Recognizing special infrequent events as described above; and
- For food and refreshments to be shared in the office.

*Sonya is taking up a collection for a tennis racquet from everyone in her section to be presented to her section chief on the occasion of his retirement. She tells each person that the contribution amount is \$5.00.*

Is this arrangement permissible? No.

The occasion is special and infrequent and, as such, would allow for a group gift made up of voluntary contributions. Sonya's method of collection is improper, however, because it could result in contributions not voluntarily given. Sonya may suggest a nominal amount but must indicate to all employees solicited that they are free to contribute less or nothing at all.

. . .

Of course, even if a gift from a subordinate to his superior falls within one of the exceptions, it would still be impermissible if it were coerced by the superior.

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# Conflicting Financial Interests

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**"No one should be judge  
in his own case."**

Publius Syrus  
1st century B.C.

SGEs are allowed to participate in particular matters of general applicability, such as the development of general regulations (e.g., our Section 106 regulations), policies, or standards, where the disqualifying interest arises from the SGE's non-Federal employment or prospective employment. However, there are three important limitations to this: (1) the matter cannot have a special or distinct effect on the SGE or his/her non-Federal employee, other than as part of a class; (2) the exemption does not cover interests arising from the ownership of stock in the employer; and (3) the non-Federal employment must involve an actual employee/employer relationship, as opposed to an independent contractor relationship.

## What is a disqualifying financial interest?

*Fred, an employee at the National Institutes of Health, is responsible for reviewing proposals for a new library computer search system. Computer Corporation, a closely held company in which Fred owns a majority of the stock, has submitted a proposal for the new system.*

Would Fred's review of the proposals for the new library computer system present a problem? Yes.

Under the Standards of Ethical Conduct and by criminal statute, 18 U.S.C. § 208(a), an employee is prohibited from participating personally and substantially in an official capacity in particular matters in which, to his knowledge, the employee has a financial interest. For a conflict to exist, it is not necessary that the extent of the possible gain or loss be known. The actual amount of the gain or loss is not important. However, to trigger the disqualification requirement, the matter in which the employee would otherwise participate must have a direct and predictable effect on his financial interest.

## Imputed interests

Suppose that Fred's wife instead of Fred owns a majority of the stock in Computer Corporation. Would her interest in Computer Corporation disqualify Fred from reviewing the proposals for the new system? Yes.

Under the law, the financial interests of certain persons and entities, if known to the employee, will result in disqualification of the employee just as if the interests were the employee's own. These persons and entities include--

- The employee's spouse;
- The employee's minor child;
- The employee's general partner;
- An organization which the employee serves as officer, director, trustee, general partner or employee; and
- A person with whom the employee is negotiating for or has an arrangement concerning prospective employment.

## Resolving the conflict

If you suspect that you may have a disqualifying financial interest, you should notify the person responsible for giving you the conflicting assignment or consult with your agency ethics official. To do otherwise may result in a criminal violation. With the aid of these persons, you should consider the alternatives for resolving the conflict. They include--

- **Disqualification**

The usual requirement is not to participate in the particular matter. It may also be necessary to take steps to ensure that others do not mistakenly involve you in the matter. A formal written statement of disqualification usually is not necessary but may be desirable in order to create a record of your actions.

- **Divestiture**

In some instances, sale or other divestiture of the asset creating the financial interest presents an alternative to disqualification from participation in the matter. If the decision is made to divest, it may be possible to defer the tax consequences of divestiture, but only if the asset is sold pursuant to a certificate of divestiture issued by the Office of Government Ethics. For this reason, it's important to see your ethics officer before selling any assets.

- **Waiver**

In some instances a waiver of general applicability may already cover the situation. Alternatively, the specific circumstances may warrant grant of an individual waiver by an authorized agency official. A waiver permits continued participation in a matter even in the absence of divestiture.

SGEs are not eligible for certificates of divestiture.

Council members may only obtain a waiver through certification issued by the President of the United States.

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## What is a prohibited financial interest?

*Denise has received an offer of employment from a Federal agency that regulates certain chemical substances. Her prospective supervisor informs her that, under the agency's supplemental regulations, she will have to resign her board position with and divest her stock interests in Chemical Manufacturing Corporation.*

Can the agency require Denise to take these actions as a condition of employment? Yes.

An employee may not acquire or hold any financial interest that the employee is prohibited from acquiring or holding--

- By statute;
- By agency supplemental regulation; or
- By reason of an agency determination that an individual employee's acquiring or holding of a particular financial interest would present a substantial conflict.

When an employee holds a prohibited financial interest, divestiture or termination of the interest is required if the employee is to continue on the job.

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# Impartiality in Performing Public Duties

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***"When a fellow says it hain't the money but the principle o' the thing, it's the money."***

Frank McKinney "Kin" Hubbard  
(Abe Martin)  
1868-1930

## What are situations raising appearance concerns?

*Pete's work at the Food and Drug Administration requires him to participate in the process for review and approval of certain new drugs. His mother has just taken a senior position with a biomedical research company producing a new drug that would typically be subject to Pete's review. Pete is concerned that it might "look bad" if he participates in the review and approval process for the drug, but after doing some research he determines that his mother's employment with the research company is not a "disqualifying financial interest" under 18 U.S.C. § 208(a).*

Should Pete disregard his concerns and proceed to review the drug?  
No. Pete is right to be concerned. In addition to the financial conflict of interest situations discussed above, there are a number of situations that raise "appearance" concerns and, consequently, require employees to take certain steps to avoid an appearance of the loss of impartiality.

Situations presenting some of the most significant "appearance" concerns arise when an employee is called upon to participate in a particular matter involving specific parties and the employee knows that--

- The matter is likely to affect the financial interests of a member of the employee's household; or
- One or more of the parties to the matter is or is represented by--
  - A person or organization with whom the employee has or seeks a business relationship that involves something more than a routine consumer purchase;
  - A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;
  - A person or organization for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;
  - Any person or organization for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or
  - An organization, other than certain political organizations, in which the employee is an active participant.

**The following cases are examples of situations raising appearance concerns:**

*Maria, who works for the General Services Administration, wants to begin an outside retail business. In her private capacity, she has made an offer to buy a store owned by a local developer. The developer has pending with GSA a proposal to provide Federal office space and Maria expects that she will be called upon to evaluate the bid.*

*Frank inspects manufacturing establishments for the Occupational Safety and Health Administration. His brother-in-law and friend, James, has just purchased a plant that Frank is assigned to inspect.*

*Rebecca recently resigned her position as vice president of an electronics company in order to join the Federal Aviation Administration. Her new boss at the FAA has asked her to participate in the administration of a contract for which her old company is a first-tier subcontractor.*

*Jeremy is an attorney at the Agriculture Department as well as a member of and publicity chairperson for the private organization Stop the Gypsy Moths. Stop the Gypsy Moths files a lawsuit against USDA and Jeremy's boss asks Jeremy for his legal analysis of the case.*

**Resolving appearance concerns**

If you are faced with a situation that falls within one of the above categories, your first step is to decide whether a reasonable person with knowledge of the relevant facts would question your impartiality if you participated in the matter. In making this determination you may seek assistance from your supervisor, your agency ethics official, or the person specifically designated by your agency to address appearance problems (the "agency designee"). Remember that your honesty and integrity are not relevant considerations in this determination.

If you decide that a reasonable person would not question your impartiality, then you may participate in the matter, unless the agency designee reaches a different conclusion. If you or the agency designee decide that your impartiality would be questioned, then you should not participate unless the designee, considering all the circumstances, determines that the interest of the Government in your participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

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You should be aware that not all appearance problems fall into the above categories. The steps outlined here also should be followed if you are concerned that other circumstances may raise a question about your impartiality.

### **Extraordinary severance payments**

Appearance considerations may also require disqualification of an employee who, on departure from his prior job, received from his former employer an extraordinary payment or other item worth more than \$10,000. Under certain circumstances, such a payment may bar the employee from participating, for two years, in matters in which the former employer is a party or represents a party.

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# Seeking Other Employment

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**"Government is only as good as the men in it."**

Drew Pearson  
1897-1969

*Karen serves on a panel at the National Science Foundation that reviews grant applications to fund research relating to deterioration of the ozone layer. A representative from X university, which has an application pending before Karen's panel, calls Karen to ask whether she might be interested in applying for a faculty position with the university. They discuss generally the duties of the position and Karen's qualifications to fill it. Karen indicates she may be interested.*

May Karen participate in the review of X university's grant application? Not unless she first obtains a written waiver under 18 U.S.C. § 208(b).

An employee who is seeking employment may not participate in particular matters that would affect the financial interest of the prospective employer. Where, as in Karen's case, the parties are actually engaged in discussions regarding employment, this prohibition is imposed by a criminal statute, 18 U.S.C. § 208, and may be avoided only by obtaining a written waiver under section 208(b). As the example indicates, the prohibition may be triggered even before negotiation of specific terms and conditions of employment begins.

...

*Karen hears about a job at Y university, which also has a grant application pending before the panel on which she serves at NSF. She mails her resume to Y university and is waiting to receive a reply.*

Would Karen's participation in review of Y university's grant application present a problem? Yes.

Karen has not engaged in the kind of two-sided negotiation for employment that would bring her job search within the reach of section 208. Even mailing out an unsolicited resume, however, if it were sent to an organization that would be specifically and individually affected by Karen's performance of her official duties, could cause a reasonable person to question Karen's impartiality. For this reason, Karen may not participate in the review of Y university's application unless her participation is authorized in advance by the person designated by her agency to address such matters.

Make it your business to understand the legal consequences of job-hunting and job discussions. Consult with your agency ethics official *before* you begin your job search and *immediately upon* receiving unsolicited offers or inquiries, if a prospective employer has a financial interest in matters that cross your desk.

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# Restrictions on Former Employees

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***"Corrupt influence, which is itself the perennial spring of all prodigality, and of all disorder; which loads us, more than millions of debt; which takes away vigor from our arms, wisdom from our councils, and every shadow of authority and credit from the most venerable parts of our constitution."***

Edmund Burke  
1729-1797

## Permanent ban on certain activities

*Five years ago Sam left the Federal Maritime Commission to set up his own law firm specializing in maritime law. Recently he was asked to represent a carrier in an appeal to which the Commission is a party. Years ago, Sam realizes, he handled the same case on behalf of the Commission.*

May Sam represent the carrier in the appeal? No.

A former employee is forever barred from representing another person or organization before a Federal department, agency, or court on certain matters in which the former employee participated personally and substantially while working for the Government. The bar is imposed by the criminal "post-employment" statute, 18 U.S.C. § 207, which is intended to prevent employees from "switching sides."

## Two-year ban on certain activities

*Shortly before Mary retired from her job at the Defense Department last year, an accountant Mary supervised began an audit focusing on cost overruns under a DOD contract with an electrical pads supplier. Since Mary retired before the audit was complete, she never signed or even read the audit report. Now the supplier wants Mary to represent him in his dealings with DOD on the contract.*

May Mary represent the supplier before DOD? No.

The post-employment statute provides that, for two years after terminating Government employment, a former employee may not represent another person or organization before a Federal department, agency, or court on certain matters which were pending under the employee's supervision during the last year of his Government service. In the example, it does not matter that Mary never read the audit report. If she knows or should know that the audit was under her official responsibility, her representation of the supplier could subject her to criminal penalties.

Non-Federal Council members do not qualify as such "senior employees."

### **Additional restrictions imposed by statute**

The post-employment statute prohibits all former employees, for a period of one year after leaving Government service, from engaging in activities related to certain trade and treaty negotiations. The statute also imposes additional one-year restrictions on the activities of former senior and very senior Government employees. These are generally officials paid at level V of the Executive Schedule and above. The restrictions are on representations by these officials to the agencies that they served and, in the case of very senior employees, on representations to certain high ranking officials throughout the Government. Former senior and very senior employees are also subject to a one-year ban prohibiting certain services to foreign governments and foreign political parties.

SGEs are not covered by the requirements of E.O. 12834.

### **Additional restrictions imposed by executive order**

Some noncareer executive branch employees are also subject to post-employment restrictions imposed by Executive Order 12834 of January 20, 1993. Under this executive order, senior appointees (certain officials appointed to positions on or after January 20, 1993, by the President, Vice President, or an agency head) are required to sign and adhere to ethics pledges that impose restrictions on certain representations before or to agencies served by the appointees for five years after termination of their employment as senior appointees with those agencies. In the case of senior appointees in the Executive Office of the President, the restriction is on certain representations before or to agencies for which the appointees had personal and substantial responsibility at the EOP. In addition, all affected senior appointees are subject to lifetime restrictions on certain activities undertaken on behalf of foreign governments and foreign political parties.

Executive Order 12834 also imposes post-employment restrictions on certain persons appointed to noncareer executive agency positions on or after January 20, 1993, who are involved in certain trade negotiations on behalf of the Government. Such persons, whether senior appointees or not, are required to sign and adhere to pledges that impose a five-year prohibition on providing certain services to foreign businesses, governments and political parties. The five-year period begins to run upon termination of the official's personal and substantial participation in the trade negotiation.

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Remember: The best time to consult with your agency ethics official regarding post-employment restrictions is *before* leaving the Government. However, you may also obtain advice from your agency ethics official whenever, *after* you've left the Government, you find yourself confronting a post-employment issue.

You should know that there are other sources of post-employment restrictions that could apply to your activities after leaving Government. These include statutes specific to particular agencies or to employees performing particular functions and, for lawyers, bar association rules.

There are no such statutes applicable to non-Federal Council members.

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# Misuse of Position

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**"Stand the gaff, play fair, and be a good man to camp out with."**

Theodore Roosevelt  
1858-1919

## Use of public office for private gain

*Sylvia, an employee of the Securities and Exchange Commission, offers to help a friend with a consumer complaint by calling the manufacturer of a household appliance. In the course of the conversation with the manufacturer, Sylvia states that she works for the SEC and is responsible for reviewing the manufacturer's SEC filings.*

*Tony, an employee of the Department of Education, is asked to write a letter of recommendation to a private company for a person he knows socially. He writes the letter on official stationery and signs it using his official title.*

*Calvin, a Commissioner of the Consumer Product Safety Commission, appears on a television commercial to endorse as safe a product produced by his former employer. On the commercial he is identified as a Commissioner of the CPSC.*

What do Sylvia, Tony, and Calvin have in common? They have all misused their public offices.

Employees may not use their public offices for private gain, either their own gain or that of others. In the examples, employees used their offices to induce a benefit, to secure employment, and to suggest Government endorsement -- all for private purposes.

## Use of nonpublic information

*Gail is a Navy employee who learns that her agency will award a contract to Supplier Corporation. Before the contract is publicly announced, Gail calls her stockbroker and purchases stock in Supplier Corporation.*

*Harry, a General Services Administration employee, discloses the terms of a proposal for a GSA construction contract to a friend whose company has submitted a competing proposal.*

Are Gail and Harry making permissible use of nonpublic information?  
No.

Employees may not use or allow the use of nonpublic information to further their own private interests or the private interests of others. In addition to violating the uniform Standards of Ethical Conduct, the actions described in the above examples may also violate Federal statutes prohibiting the use and disclosure of confidential and inside information.

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## Use of Government property

*Will is a Government worker who also coaches his daughter's soccer team. On a slow day at work, he uses Government computer and photocopy equipment to type and reproduce the game and practice schedule for the soccer team.*

*Barbara works for the Government but is an avid gardening enthusiast in her spare time. She wants to have pens and paper pads on hand for notetakers at the garden club meeting at her house, so she "borrows" some from her agency's supply cabinet.*

Are these permissible uses of Government property? No.

An employee has a duty to protect and conserve Government property and may not use Government property, or allow its use, for other than authorized purposes. In addition to the Standards of Ethical Conduct, there are statutes that apply to misuse of Government property. These include statutes proscribing theft of Government property.

## Use of official time

*In addition to her Government job, Christine runs a catering business. It's difficult to reach her clients after hours, so she discusses menus and gives bids by telephone during work hours.*

*Richard, a supervisor at a Government agency, has forgotten to use his lunch break to pick up the tennis racquet he dropped off for restringing last week. During the afternoon he remembers the racquet and his evening tennis date, so he asks his secretary to pick the racquet up for him.*

Are Christine and Richard misusing official time? Yes.

Except as otherwise authorized, an employee must use official time in an honest effort to perform official duties and may not ask or direct a subordinate to perform activities other than those required in the performance of official duties.

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## Outside Activities

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*"... A time like this  
demands*

*Strong minds, great hearts,  
true faith, and ready hands;  
Men whom the lust of  
office does not kill;  
Men whom the spoils of  
office cannot buy;  
Men who possess  
opinions and a will;  
Men who have honor ;  
Men who will not lie."*

Josiah Gilbert Holland  
1819-1881

### **Is it all right to engage in outside activities while working as a Government employee?**

Most employees may engage in outside activities, which may include paid employment and civic, charitable, religious, and community service work performed without compensation. But not all activities are permissible. Employees should be aware of a number of restrictions and prohibitions on outside activities.

### **Activities that would require disqualification from matters critical to performance of the employee's official duties**

*Juan's principal duty in his new position at the Environmental Protection Agency is to write regulations relating to the disposal of hazardous waste. He has been asked to serve, however, as president of a nonprofit environmental organization that routinely submits comments on such regulations.*

May Juan serve as an officer of the environmental organization?  
No.

An employee may not engage in an outside activity if the rules dealing with conflicting financial interests or the appearance of a loss of impartiality would require the employee's disqualification from matters so central or critical to the performance of the employee's official duties that his ability to perform the duties of his position would be materially impaired.

### **Representing a person or organization before a Federal department, agency or court; serving as an expert witness; and related activities**

*Ian is an attorney at the Federal Maritime Commission who has a small outside law practice. On a matter unrelated to his Federal service, he is thinking about accepting a fee to represent a contractor before the General Services Administration Board of Contract Appeals, to contest the Government's termination of its contract.*

*Catherine is an official at the Small Business Administration. From time to time she looks in on an elderly neighbor to see if she needs anything. On a recent visit, Catherine learned that her neighbor is upset over the Internal Revenue Service's assessment of a penalty against her because*

*of a claimed overdue payment. The neighbor is apprehensive about calling the IRS to explain the claimed IRS error, so Catherine would like to call for her. She does not intend to take any compensation.*

Are the representational services Ian and Catherine propose to provide permissible? No.

Two overlapping Federal statutes, 18 U.S.C. §§ 203 and 205, prohibit an employee from making representations -- whether for compensation or not -- before any department, agency, or court if the matter is one in which the United States has a substantial interest. The statutes also prohibit an employee from--

- Taking compensation for such representational services provided by another; and
- Receiving consideration for assisting in the prosecution of a claim against the United States.

SGEs are restricted by Sections 203 and 205 only in connection with particular matters involving specific parties (as opposed to matters of general applicability, such as broadly applicable policies and rulemaking proceedings). Furthermore, an SGE is subject to the restrictions of Sections 203 and 205 only with respect to those matters in which the SGE at any time participated personally and substantially as an SGE.

However, those SGEs who have served the Federal Government for more than 60 days during the immediately preceding period of 365 consecutive days are subject to the prohibitions of Sections 203 and 205 in connection with any matter that is pending in their Federal agency.

There are a number of exceptions to sections 203 and 205. An important one allows an employee, under certain circumstances, to represent himself, his parents, his spouse, his children, and certain others for whom the employee serves in a specific fiduciary capacity, such as a guardian.

There is also an exception in the statutes for giving testimony under oath. Use of this exception, however, is limited by the Standards of Ethical Conduct. The Standards provide that an employee may not serve as an expert witness for a private party in a proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest. This restriction applies whether compensation is received or not. It may be waived by the employee's agency ethics official under certain conditions.

### **Receiving salary, contribution to, or supplementation of salary from a source other than the United States**

*The Society for Ethical Conduct in Government, a private, nonprofit, and non-partisan organization, announces that it is sponsoring a number of two-year fellowships for individuals of high ethical character who are willing to serve in any policy position in the Federal Government during the pendency of the fellowship. To encourage people to apply for the fellowship, the Society has determined that benefits of the fellowship will include monthly payments from the Society that make up the difference*

*between the recipient's Federal salary and \$150,000. The fellowship program is completely the idea of the Society and there is no statute authorizing it. Warren, a Federal employee in a policy position, has applied for one of the fellowships.*

If Warren is selected as one of the fellows, may he accept the monthly stipend? No.

Section 209 does not apply to SGEs.

Warren's acceptance of the money would probably be considered a violation of a criminal statute, 18 U.S.C. § 209. With some limitations, this statute prohibits an employee from receiving anything other than his Federal salary as compensation for services as a Government employee.

### **Teaching, speaking, and writing**

*Paula works in the public information office of the Internal Revenue Service. A private trade association offers to pay her to teach a short course on a new taxpayer assistance program being implemented by the IRS.*

May Paula accept the offer? No.

An employee may not receive compensation -- including travel expenses for transportation and lodging -- from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties. For most employees, teaching, speaking, or writing is considered "related to official duties" if--

- The activity is part of the employee's official duties;
- The invitation to teach, speak, or write is extended primarily because of the employee's official position;
- The invitation or the offer of compensation is extended by a person whose interests may be affected substantially by the employee's performance of his official duties;
- The activity draws substantially on nonpublic information; or
- The subject of the activity deals in significant part with agency programs, operations or policies or with the employee's current or recent assignments.

This particular aspect of the definition of "related to official duties" is relaxed under certain circumstances for some SGEs. Please contact me if you have questions about this.

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For certain high-ranking noncareer employees, teaching, speaking and writing will also be considered "related to official duties" if the subject of the activity deals in a significant part with the general subject matter area, industry, or economic sector primarily affected by the programs and operations of such an employee's agency.

There is an exception that, in certain circumstances, allows all employees to accept compensation for teaching certain courses involving multiple presentations even if the courses relate to the employee's official duties. Various requirements must be met, however, in order to use this exception.

Again, it's a good idea to consult with your agency ethics official before engaging in any outside teaching, speaking, or writing. In addition to helping you determine whether the proposed activity is "related to duties," the official will advise you regarding any restrictions on acceptance of honoraria for certain appearances, speeches, and articles. You should know that such restrictions may apply even if the proposed activity bears no relationship to an employee's official duties.

### **Fundraising activities**

The Standards of Ethical Conduct also contain rules governing fundraising for nonprofit organizations by an employee in his personal capacity. There are specific rules limiting the use of official title, position, or authority to further a fundraising effort and rules restricting solicitation of funds from subordinates and persons whose interests may be affected by actions of the employee's agency.

SGEs are not subject to these outside earnings restrictions.

### **High-ranking noncareer employees and Presidential appointees**

*Emily holds a noncareer Senior Executive Service position with a Federal agency and is paid at a rate of pay in excess of the GS-15 level. She also has an outside job as head of marketing for a very successful family mail order business. This outside job provides nearly half of Emily's annual earned income.*

Are Emily's outside earnings permissible? No, not in that amount.

Certain noncareer employees whose rate of basic pay is equal to or greater than the annual rate of basic pay for positions classified above GS-15 are subject to a 15 percent limitation on outside earned income.

In any calendar year, their outside earned income may not exceed 15 percent of the annual rate of basic pay for level II of the Executive Schedule.

*William is a noncareer employee of the White House who is paid in excess of the GS-15 level. A friend offers to pay him a small fee to draft wills for the friend and his wife.*

Is the arrangement permissible? No.

Covered noncareer employees are subject to a number of restrictions on their outside activities in addition to the 15 percent limitation on outside earned income. They may not receive any compensation for --

- Practicing a profession, such as law, which involves a fiduciary relationship;
- Affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship;
- Serving as an officer or member of the board of any association, corporation or other entity; or
- Teaching without prior approval from the designated agency ethics official.

In addition, and regardless of whether they receive any compensation, such employees also may not permit use of their names by any firm or other entity which provides professional services involving a fiduciary relationship. Note that for purposes of the "fiduciary relationship" restrictions, covered professions and professional services include law, medicine, insurance, architecture, financial services, accounting and the like.

Subject to certain exclusions, *Presidential appointees* to full-time noncareer positions may not receive *any* outside earned income during their Presidential appointments.

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### **Just financial obligations**

An employee must satisfy in good faith all his obligations as a citizen, including his just financial obligations. These include Federal, state, and local taxes imposed by law.

The Council does not have such pre-approval requirements.

### **Agency pre-approval requirements**

Some agencies require by supplemental regulation that employees obtain prior approval before engaging in outside activities. Even if advance approval is not required by your agency, however, it's a good idea to consult with an agency ethics official to make sure that the activity you're considering does not run afoul of applicable statutes, the Standards of Ethical Conduct, or other regulations specific to your agency.

### **Additional restrictions**

There are a number of additional restrictions on the activities of Federal employees. These include--

- The Emoluments Clause of the United States Constitution, article I, section 9, clause 8, which prohibits acceptance of gifts and compensation from foreign governments;
- 18 U.S.C. § 219, which prohibits acting as an agent of a foreign principal under specified circumstances; and
- The Hatch Act, 5 U.S.C. §§ 7321 through 7328, which applies to political activities of Federal employees.

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# Special Government Employees and Procurement Officials

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*"In a civilized life, law  
floats in a sea of ethics."*

Earl Warren  
1891-1974

Special Government employees and procurement officials are two types of Federal employees that have a special status under applicable ethics laws and regulations.

## Special Government employees

The term "special Government employee" is defined in 18 U.S.C. § 202(a). With some exceptions, it applies to employees who are retained, designated, appointed, or employed to perform temporary duties, either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period. Special Government employees are subject to many of the ethics statutes and to most of the Standards of Ethical Conduct. However, parts of some of the statutes and certain Standards do not apply at all to these employees and some impose reduced standards.

## Procurement officials

The term "procurement official" refers to employees who participate personally and substantially in certain activities, as defined at part 3.104-4(h) of the Federal Acquisition Regulation, during the award phase of a Government contract. Procurement officials, while subject to the ethics statutes and the Standards, are also subject to 41 U.S.C. § 423. This statute is implemented at part 3.104 of the Federal Acquisition Regulation and imposes more rigorous standards relating to gift acceptance, employment discussions, post-employment activities, and disclosure of procurement-sensitive information.

. . .

In the interest of brevity and simplicity, this handbook does not attempt to address the special rules unique to special Government employees and procurement officials. Employees who fall within one of these groups should ask their agency ethics officials for information on the ethics rules specific to them. Such information should then be used in conjunction with this handbook.